NO. 18551

United States Court Of Appeals

NINTH CIRCUIT

HOWARD P. CARROLL and H. CARROLL & CO.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS

Appeal from the United States District Court for the
Southern District of California,
Central Division

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JURISDICTION

The appellants, Howard P. Carroll and H. Carroll & Co., who will be referred to herein as "defendants," as they appeared in the trial court, or by their respective names, were charged in a six-count indictment with having committed a fraud in the sale of securities in violation of 15 U.S.C. 77q(a) and were tried and convicted on all counts in the United States District Court for the Southern District of California, Central Division.

In identifying the Clerk's Record and the Transcript of Testimony, the letter "P" will be used to signify the page of the Clerk's Record and the letter "R" to identify the page of the Transcript.

The defendant Howard P. Carroll was sentenced by the court to one year on probation and fined $2,500. H. Carroll & Co., a corporation, was fined $50 on each count (P. 345).

The indictment charged an offense against the laws of the United States, and jurisdiction following sentence lies in this Court, pursuant to Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure. A Notice of Appeal was filed within the time and in the manner prescribed by law (P. 351).

STATEMENT OF THE CASE

History

On May 23, 1962, the six-count indictment was returned and filed against Howard P. Carroll and H. Carroll & Co. (P. 2). The indictment charged that the defendants did knowingly, unlawfully, and willfully employ a device, scheme, and artifice to defraud in the sale of Comstock, Ltd. stock by the use of the mails to the six individuals named in the indictment -- all in violation of 15 U.S.C. 77q(a) (P. 2).

The scheme which was charged centered around certain sales of Comstock, Ltd. stock by the brokerage firm of H. Carroll & Co. through its Beverly Hills office.

Various motions attacking the indictment and the actions taken by the United States Attorney in the investigation of H. Carroll & Co. were made prior to trial and denied. Thereafter, trial commenced on November 1, 1962, and after six days of trial

the government rested (R. 784).

The defendants then moved to strike certain testimony and evidence and for a judgment of acquittal (R. 786), and after the court denied the motion to strike and reserved ruling on the motion for a judgment of acquittal the defendants elected to rest their case without putting on evidence (R. 847).

After the defense rested, the motion for a judgment of acquittal was renewed, and the motion was again taken under advisement (R. 850). The trial judge, thereafter, allowed the case to go to the jury, and guilty verdicts were returned against both defendants on all counts (R. 258-259). A motion was then made for judgment notwithstanding the verdict, and the court set arguments on the motion for a judgment of acquittal and the time for sentencing, if the motion was denied, for December 3, 1962 (R. 289). After briefs were submitted, the motion was continued to December 17, 1962, for a further hearing and for the submission of further briefs on the motion for judgment of acquittal and for sentencing, if the motion should be denied (R. 289).

On December 17, 1962, the court denied the motions for a judgment of acquittal and imposed the fines and sentences noted above. Execution and the time for payment of the fine by Howard Carroll was stayed for six months (P. 345).

On December 19, 1962, the court, on its own initiative vacated the stay of execution granted to the defendant Howard P.

Carroll on December 17, 1962, and in lieu thereof entered an order granting the defendants a stay of execution to and including December 28, 1962.

A Notice of Appeal was thereafter duly filed on December 26, 1962 (P. 353).

On December 28, 1962, the $2,500 fine assessed against Howard P. Carroll was paid.

A statement of points was filed on January 13, 1963, in the United States District Court for the Southern District of California, Central Divison (P. 355).

Error is predicated on each of the points specified in the Statement of Points, but space limitations have caused this brief to be limited to the 13 points which are summarized in the index to the argument.

The Facts

The defendant Howard P. Carroll was admittedly the president of H. Carroll & Co., a brokerage firm which had its principal office in Denver, Colorado, and branch offices in various places, including Beverly Hills, California. The other officers and directors of H. Carroll & Co. were Robert Leopold, who was a vice president, and Gerald M. Greenberg (R. 283, 313). Mr. Gerald M. Greenberg served as a trader for the company which did a general brokerage business in over-the-counter securities (R. 313). Prices were set by the trading department on all stocks which were

purchased and sold (R. 318).

In the early part of 1957, a branch office of H. Carroll & Co. was opened and staffed by salesmen hired by Robert Leopold after he had conducted an investigation as to the salesmen's qualifications (R. 287). Thereafter, the office in Beverly Hills was managed by Robert Alaska and Martin McIntyre (R. 288).

During the month of April and later in May 1957, Robert Leopold attended sales meetings at the Beverly Hills office of H. Carroll & Co. to make certain that full and correct representations were made in the sale of stock (R. 294). He said that any salesman found making a misrepresentation was immediately dismissed (R. 288).

From March 1, 1957, to July 1, 1957, the period set forth in the indictment, the Beverly Hills office of H. Carroll & Co. sold various stocks, including Comstock, Ltd., as did other over-the-counter brokerage houses (R. 292). Mr. Leopold also testified that the company lost a large sum of money in the operation of its Beverly Hills office by reason of the actions of its personnel during the critical period (R. 294). In selling stock, H. Carroll & Co., according to Mr. Leopold, obtained prices for the stock which was to be sold from other brokers and never set a market (R. 299-305). His testimony was corroborated by Mr. Greenberg, who said that prices for stocks were obtained from other brokers over the teletype machine (R. 318).

In the early part of 1957, Howard P. Carroll was introduced to David Alison, who was endeavoring to obtain money to further develop his charcoal manufacturing and sales operation (R. 91). Mr. Alison was a rancher from Ventura, California, who held an interest in the ranch which was known as El Rancho Cola (R. 77). He contacted Mr. Carroll after he had exhausted all avenues of obtaining money to carry out a charcoal burning and sales program which Col. T. R. Gillenwaters had formulated for Country Club Charcoal (R. 483). The ranch which Mr. Alison had an interest in was grown over with live oak, and it was his plan to burn the oak in kilns and manufacture charcoal briquettes for sale to supermarkets and other outlets in the California area (R. 78). To carry out his plans, he had formed Country Club Charcoal, a Nevada corporation, with the assistance of Col. T. R. Gillenwaters and had borrowed $67,500 from a company which was controlled by Col. Gillenwaters to build kilns and otherwise develop his charcoal operation (R. 79).

Col. Gillenwaters thereafter chartered the course of Country Club Charcoal and caused it to merge into Comstock, Ltd. (R. 82). Comstock, Ltd. was a mining company whose stock was listed on the San Francisco Mining Exchange at the time the merger was effected (R. 150). Its stock was held principally by Archie Chevrier, who operated a brokerage firm under the name of Chevrie & Co. in San Francisco, California (R. 83-84). To acquire

part of the stock held by Archie Chevrier, David Alison and others signed notes in the principal amount of $125,000. The certificates representing the stock previously owned by Archie Chevrier and purchased by David Alison eventually turned up in an escrow account at the Securities Transfer Corporation in Denver, Colorado, for release to David Alison, or his order, upon the payment of 25 cents per share (R. 396). Thereafter, David Alison, with the assistance of Col. T. R. Gillenwaters, endeavored to build kilns and sell charcoal to various commercial outlets in the State of California and did sell and contract to sell substantial amounts of charcoal to various supermarkets and other stores (R. 137-144). Money for the development operations of Comstock, Ltd. came from funds paid into the company by H. Carroll & Co. as a result of the purchase of stock on deposit at the Securities Transfer Corporation at 25 cents per share (R. 396). Stock was also purchased by H. Carroll & Co. from the firm of Chevrier & Co., a member of the San Francisco Mining Exchange. Shares purchased were thereafter sold as principal to various customers.

Otto P. Gustte testified that he had examined the purchase and sales journal of H. Carroll & Co. during the course of his investigation for the Securities and Exchange Commission and had discovered that during the period questioned in the indictment H. Carroll & Co. had sold 407,950 shares of stock of Comstock, Ltd. to its customers (R. 715), and that the records reflected that

H. Carroll & Co. had acquired 313,000 of the shares from the Securities Transfer Corporation escrow account (R. 715). During the period set out in the indictment, the stock fluctuated from 25 cents to 36 cents per share on the San Francisco Mining Exchange.

Comstock, Ltd., during early 1957, had caused a brochure (Exhibits 57 and 85) to be prepared to report the production efforts and present activities of the company to its stockholders (R. 537). The brochure was prepared by Col. T. R. Gillenwaters and Kenneth Raetz and was never seen by Howard P. Carroll prior to the time that it was completed (R. 543). Some of the brochures were used by salesmen of H. Carroll & Co. in connection with the sale of Comstock, Ltd. stock. Salesmen of H. Carroll & Co. attended a meeting where Col. Gillenwaters was introduced, with Henry Caulfield, Howard P. Carroll, David Alison, and others in Beverly Hills, California, during April of 1957 (R. 94). At the meeting the potential of the charcoal industry was explained, and subsequent to the meeting the salesmen were all taken to the project at Ventura, California, to see just what development was taking place (R. 95).

Nearly five years after the last sale of Comstock, Ltd. was made by H. Carroll & Co., charges were made to the Grand Jury and an indictment was returned and filed on May 23, 1962, which provided the basis for a trial that extended over six days (P. 2).

During the course of the trial, the prosecution called David Alison to describe his part in the management and development of the charcoal business (R. 77-157). In addition to Mr. Alison, the prosecution looked to Col. T.R. Gillenwaters for testimony as to his work as an industrial consultant and as a management expert in causing Country Club Charcoal to be merged into Comstock, Ltd. (R. 481, 482). The prosecution also called Kenneth Raetz, an advertising executive, H. Ward Dawson, and Ralph Frank to testify about the preparation of the brown brochure that was prepared for submission to the stockholders of Comstock, Ltd. (Exhibits 57 and 85) (R. 517-555, 387-407, 672-697).

Other than witnesses of the type named, the prosecution called salesmen of H. Carroll & Co. and the investor witnesses named in the indictment and others who had purchased stock to show the representations and basis upon which the stock was purchased. (Marems R. 567-578; Moen R. 606-14; Bloemsma R. 600-606; Bryer R. 423-440; Graham R. 614-620; Indorff R. 590-600; Johnson R. 408-423; Krell R. 558-566; Wisda R. 578-590; Wyatt R. 658-670.)

All of the officers and directors of H. Carroll & Co. and other employees connected with the trading and bookkeeping department of H. Carroll & Co. were called as witnesses to testify about the manner in which the sales of Comstock, Ltd. stock were

carried out and the part played by Howard P. Carroll in the operation of H. Carroll & Co. (Greenberg R. 312-344; Leopold R. 249-309; Scholz, R. 361-386; Tice R. 346-361; Uhlir R. 467-481). In addition to the witnesses named, the prosecution called Gaither G. Loewenstein to testify as to records maintained by Chevrier & Co. in its dealings with H. Carroll & Co. when stock was purchased by H. Carroll & Co. over the San Francisco Mining Exchange (R. 727-732). The remainder of the testimony related to documents and things which were located in the course of the investigation by the staff of the Securities and Exchange Commission. Testimony disclosed that Marvin Greene, an employee of Securities and Exchange Commission, sent a letter of inquiry to the law firm of Wainwright and Fleischell, 841 Flood Building, San Francisco 2, California (R. 458-465). In response to his inquiry, a letter was received from J. Edward Fleischell bearing the date of October 18, 1957, and addressed to Mr. Marvin Greene, Securities and Exchange Commission, Regional Office, Room 339, 821 Market Street, San Francisco, California. Mr. Greene testified that he received the letter in the mail and that it was part of the records of the Securities and Exchange Commission (R. 462-465). J. Edward Fleischell was not identified as an attorney for either of the defendants or connected in any way to the defendants or to Comstock, Ltd., David Alison, Col. T. R. Gillenwaters, or any other person who had an interest in any of the transactions which

involved Comstock, Ltd. or H. Carroll & Co. The letter listed certain Comstock, Ltd. certificate numbers, the number of shares represented thereby, and the names of certain persons who were allegedly record owners thereof.

The letter in question (Exhibit 22) was admitted into evidence upon the identification of Mr. Greene and on the basis of the Federal Business Records as Evidence Act, 28 U.S.C. 1732 (R. 465). Thereafter, the prosecution offered records which they had obtained from the Nevada Transfer Agency relating to an account kept as transfer agent for Comstock, Ltd. and the records (Exhibits 28, 29, 30 and 31) (R. 741) were offered and received into evidence under the authority of the Business Records as Evidence Act, 28 U.S.C. 1732. The only foundation for the admission of the Nevada Transfer Agency records was the stipulation by counsel for the defense that the records were part of the Nevada Transfer Agency records. They were objected to because no proper foundation was laid and because the exhibits were necessarily hearsay in the light of this Court's pronouncement in Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958) (R. 649-650).

Also received into evidence as a business record was a stack of confirmation slips, bank drafts, and notices that William Ziering obtained from Archie Chevrier in the basement of the San Francisco Mining Exchange and which Mr. Ziering said

were the records of Chevrier & Co., a brokerage firm in San Francisco, Exhibits 18 and 104 (R. 711, 729). The Chevrier & Co. records also contained certain confirmation slips that were on forms that bore the name of H. Carroll & Co. The prosecution offered the Chevrier & Co. records relating to Comstock, Ltd. (Exhibit 104) after having the documents which reflected purchases of Comstock, Ltd. stock over the San Francisco Mining Exchange identified by Gaither Loewenstein, who had formerly been employed by Chevrier & Co. (R. 727-732).

The confirmation slips of H. Carroll & Co. that were taken from the Chevrier & Co. storage area in the basement of the San Francisco Mining Exchange were admitted into evidence as business records after being identified by Liboslav Uhlir as forms of the type used by H. Carroll & Co. (R. 707, 708). All of the exhibits referred to were admitted under the Business Records as Evidence Act, 28 U.S.C. 1732).

Howard Sillick, who was a staff accountant for the Securities and Exchange Commission, was called. He offered testimony relating to his preparation of Exhibits 105 and 106 (R. 742, 754). Exhibits 105 and 106 were charts which Mr. Sillick had prepared to summarize his conclusions regarding the various documentary exhibits. Exhibit 105 was said to be a summary of Exhibit 22 and Exhibits 28, 29, 30, and 31 (Nevada Transfer Agency Records) and was offered apparently for the purpose of tracing stock of

Comstock, Ltd. to the investor witnesses named in the indictment from Archie Chevrier (R. 741). Exhibit 106 was a chart which Mr. Sillick prepared reflecting the number of shares of Comstock, Ltd. which were traded on the San Francisco Mining Exchange from March to June of 1957, and was apparently also prepared to show the number of shares of stock of Comstock, Ltd. delivered by Chevrier & Co. to H. Carroll & Co. Exhibit 106 was prepared, according to Mr. Sillick, from information which he had taken from Exhibit 104, records of Chevrier & Co. and the quotation sheets of the San Francisco Mining Exchange for the months of March to June of 1957 (Exhibits 32, 33, 34 and 74). Both charts were admitted into evidence, even though Mr. Sillick testified that clarification was required in preparing the compilations which formed the basis of his charts and that he had written the Nevada Transfer Agency and received the information which was necessary to complete the exhibits (R. 770-771). After Mr. Sillick admitted using matters not in evidence to prepare the charts, a motion to strike both Exhibit 105 and Exhibit 106 was made (R. 771). Both Exhibit 105 and Exhibit 106 were admitted over the defendants' objection that no proper foundation had been laid for their admission and that matters were contained therein that were immaterial and incompetent to the issues on trial (R. 768).

Objections were constantly made to leading questions, and the court was called upon to intervene on many occasions and asked over 450 questions of the various witnesses called by the prosecution. At the conclusion of the case, the court said:

> "I must say that it is regrettable that the court has to do a good part of the examination of witnesses, but I suppose the court is here for the purpose of bringing about justice and it is necessary to be done.
>
> "I want to forewarn the Government, however, that I am not going to continue doing the practice of law that I have done in this case." (R. 1024.)

Earlier, the court had said, when reviewing the evidence:

> ". . . I want to say this to counsel for the government, that it is regreatable [sic], and the Court doesn't enjoy the process of having to correct you on all these occasions. . . .
>
> ". . . The thing that is bothersome in the case is that there is so much leading and suggestive interrogation that I have difficulty in determining whether it is the evidence of the witnesses or not. You must realize that a man to be convicted of a felony has to be convicted on evidence, proper evidence before the Court. And much of this evidence I am absolutely in doubt at this time as to whether or not it is the suggestion. I do not mean you did it intentionally. But the leading of the witness was such that I do not know whether his answers were his own testimony or whether he was just adopting the leading question. It's a real problem, believe me it is." (R. 829-830.)

After the prosecution rested its case, defense counsel made a motion to strike certain testimony and evidence and then moved for a judgment of acquittal (R. 785-786). When the trial court was asked by defense counsel whether it desired that the evidence be reviewed to establish the insufficiency of the government's case,

the court said:

> "I want to hear from the government first. I want to hear wherein he thinks the evidence is sufficient. I might say this very frankly: I think that perhaps there is a bare sufficiency of evidence of a prima facie case. In the state of the record though the question is taking the evidence in the most favorable light to the government is there a prima facie case. I would like to hear from the government." (R. 787.)

Thereafter, the court reviewed the indictment paragraph by paragraph with the United States Attorney. The first paragraph and charge in the indictment was that:

> "(1) From on or about March 1, 1957, until on or about July 1, 1957, the defendants Howard P. Carroll and H. Carroll & Co., a corporation, in the offer and sale of . . . the common stock of Comstock, Ltd., employed a device, scheme, and artifice to defraud, obtain money and property by means of untrue statements and material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading and engaged in transactions, practices, and a course of business which would and did operate as a fraud and deceit upon purchasers of the common stock of Comstock, Ltd."

The indictment then sets forth in six subparagraphs the manner in which the government charged that the defendants perpetrated a scheme to defraud.

In questioning the United States Attorney relating to the issue of the general scheme, the United States Attorney stated that the scheme consisted of the purchasing of a substantial portion of the Comstock, Ltd. stock sold through the facilities of the San Francisco Mining Exchange while at the same time purchasing stock from another source. Concurrently stocks of

Comstock, Ltd. are sold as principal to customers of the defendant corporation, sometimes by means of a stockholders' report on Comstock, Ltd. Analyzing the indictment, the court asked the United States Attorney about subparagraph (a), which provided:

> "(a) At the end of 1954, Comstock, Ltd., which had been organized in 1931, but which had been inactive for a number of years, had no assets and was insolvent. During 1955, Archie H. Chevrier ('Chevrier'), a member of the San Francisco Mining Exchange, a national securities exchange, acquired approximately 500,000 shares of the 700,000 shares, then outstanding, of Comstock, Ltd. For his services in obtaining a quicksilver mining lease at Cloverdale, California, and advancing funds to Comstock, Ltd., for construction of a mill, Chevrier received an additional 285,000 shares of 'treasury' stock of Comstock, Ltd. Chevrier also caused the stock of Comstock, Ltd. to be registered on the San Francisco Mining Exchange, a national securities exchange. This registration became effective in October, 1955. The Cloverdale mine was shut down in the latter part of 1956."

The United States Attorney, when questioned about subparagraph (a), admitted that the allegations contained therein had not been proved (R. 791).

Subparagraph (b) was the next subject of inquiry and provided:

> "(b) In December, 1956, Chevrier entered into an agreement with David R. Alison ('Alison') under which Chevrier transferred 500,000 shares of Comstock, Ltd. to Alison and a group of Alison's associates, in consideration of six promissory notes in the total sum of $125,000 (25¢ per share), all payable on December 31, 1957. These securities were held in escrow by Alison's attorney until delivery of the six notes to Chevrier which occurred in February, 1957. This block of 500,000 shares was then placed in escrow at Security Trust and Transfer Company in Denver, Colorado, pursuant to an agreement under which defendant H. Carroll & Co., a broker-

dealer in securities, received an option to take down such shares upon deposit of 25 cents per share in the escrow account."

The court, in examining the evidence, said that the government had made a prima facie showing as to these allegations (R. 792).

Subparagraph (c) was next looked to, which provided:

"(c) Comstock, Ltd. also agreed to issue 1,500,000 shares of its stock in exchange for all the assets of Country Club Charcoal Corporation, of which Alison was a promoter and principal stockholder. Neither Country Club Charcoal Corporation nor its predecessor had earned any profits at the time its assets were acquired by Comstock, Ltd. in March, 1957."

The United States Attorney, when questioned about subparagraph (c), admitted that subparagraph (c) had not been proven and caused the court to say:

"Well, the holes are just developing fast." (R. 792.)

Subparagraph (d) provided:

"(d) On or about March, 1957, the defendants Howard P. Carroll and H. Carroll & Co., whose main office was in Denver, Colorado, caused a branch office to be established in Beverly Hills, California. The defendant Howard P. Carroll was president, a director and controlling stockholder of H. Carroll & Co. From about March 1, 1957, to July, 1957, the defendant H. Carroll & Co., through its Beverly Hills office, sold about 300,000 shares of the stock of Comstock, Ltd. to members of the investing public. During that period the price of said stock advanced on the San Francisco Mining Exchange from 25 cents per share to 36 cents per share. The majority of the shares sold by H. Carroll & Co. was obtained at 25 cents per share from the block of 500,000 shares placed in escrow, with the balance being purchased through Chevrier on the San Francisco Mining Exchange. The defendant H. Carroll & Co. sold the stock of Comstock, Ltd. acquired from the escrow account, so established in

Denver, to the public at a price between the bid and ask price on said Mining Exchange."

In analyzing subparagraph (d) in the light of the record, the evidence discloses:

(1) That the defendants Howard P. Carroll and H. Carroll & Co. had their main office in Denver, Colorado, and caused a branch office of H. Carroll & Co. to be established in Beverly Hills, California.

(2) That Howard P. Carroll was president and one of three directors of H. Carroll & Co. (R. 792).

(3) That approximately 300,000 shares of stock of Comstock, Ltd. were sold to members of the investing public (R. 792).

(4) That the records of the San Francisco Mining Exchange establish that from March to July of 1957 the price on the Mining Exchange fluctuated from 25 cents per share to 36 cents per share for Comstock, Ltd. (R. 793).

(5) That no other part of the charge in subparagraph (d) was established by any evidence, other than that stock of Comstock, Ltd. was purchased by H. Carroll & Co. at 25 cents per share from the shares on deposit with Securities Transfer Corporation and that other similar shares had been purchased on the San Francisco Mining Exchange through Chevrier & Company.

(6) That the United States Attorney had not established from testimony that the stock was sold between the bid and ask

price on the Mining Exchange (R. 793). All of the stock that was sold by H. Carroll & Co. was sold as principal with the confirmations clearly reflecting the designation of the brokerage house as a principal (R. 587).

Subparagraph (e) was next in line for an analysis:

> "(e) During the period from March, 1957, to July, 1957, the defendant H. Carroll & Co. caused to be purchased through Chevrier on the San Francisco Mining Exchange approximately 87,000 shares of approximately 129,000 shares of the stock of Comstock, Ltd. purchased on said Exchange during said period, for the purpose of creating a false and misleading appearance of active trading therein, and for the purpose of raising and maintaining the price thereof, in order to facilitate the sale of said stock, which the defendant H. Carroll & Co. was then selling to investors."

The court inquired of the United States Attorney where the evidence was of the charge made in subparagraph (e) and was advised that it was a jury question as to why stock was being purchased on the Exchange when the defendant had at approximately the same time in fact purchased stock at 25 cents a share. The record is silent as to the existence of any wash sales. The sole evidence is that H. Carroll & Co. purchased stock of Comstock, Ltd. over the San Francisco Mining Exchange and from a deposit with the Securities Transfer Corporation and contemporaneously sold shares of stock of the same company as principal to various investors who purchased the stock.

Subparagraph (f) provided:

"(f) The defendants Howard P. Carroll and H. Carroll & Co., in order to deceive and mislead investors and to induce them to purchase shares of the stock of Comstock, Ltd., used and caused to be used a brochure describing Comstock, Ltd. entitled 'A report to stockholder,' and other similar brochures, which contained false and misleading statements with respect to the management, assets, business affairs and future prospects of Comstock, Ltd., and which were designed to arouse the interest of investors and to induce them to purchase shares of the stock of Comstock, Ltd. These brochures also omitted to state material facts with respect to the management, assets, business affairs and future prospects of Comstock, Ltd."

Obviously, the acts charged and the brochure in question constituted acts which were carried out by the management of Comstock, Ltd., Kenneth Raetz, Col. T. R. Gillenwaters, and David Alison. The brochure was admittedly the product of the work of Col. Gillenwaters and Kenneth Raetz and was not shown to Howard P. Carroll or any officer, director, or managing agent of H. Carroll & Co. in its final form before it was printed (R. 543).

After reviewing Paragraph 1 and its subparagraphs, the court commented that the crux of the matter lay in the next two paragraphs (R. 796).

Paragraph 2 provided:

"(2) The defendants Howard P. Carroll and H. Carroll & Co., in order to deceive and mislead investors, and to induce them to purchase shares of the stock of Comstock, Ltd., made and caused to be made untrue, deceptive and misleading statements of material facts, including the following:

"(a) That the stock of Comstock, Ltd. was being offered and sold at the market price.

"(b) That Comstock, Ltd. operated a quicksilver mine in Cloverdale.

"(c) That Comstock, Ltd.'s course was being chartered by shrewd, able Colonel T. R. Gillenwaters, an industrial counsel and attorney, who had a string of organizational triumphs to his record.

"(d) That Country Club Charcoal Corporation was on the verge of fantastic profits; and other

similar untrue, deceptive and misleading statements of material facts, all of which the defendants well knew to be false, fraudulent and misleading."

In reviewing the allegations with the United States Attorney:

1. The court stated that one witness, Raymond Wyatt, had said that the stock of Comstock, Ltd. was being offered and sold at the market price and that, therefore, there was evidence that subparagraph (a) was supported by testimony (R. 796).

2. The court found that subparagraph (b) was not the subject of testimony, and the United States Attorney admitted that they had given up on subparagraph (b) (R. 797).

3. As to subparagraph (c), the government proved contrary to the allegations that Comstock, Ltd.'s course was in fact being chartered by shrewd, able Colonel T. R. Gillenwaters, an industrial counsel and attorney, who had a string of organizational triumphs to his record (R. 493, 496-501).

4. The court found that the government had offered evidence on the question of fantastic profits (R. 797).

The breadth of the remaining allegation had previously been the subject of a motion to strike, which the court held was not well founded.

The court next reviewed Paragraph 3 with the United States Attorney, which provides:

> "3. The defendants Howard P. Carroll and H. Carroll & Co., in order to deceive and mislead investors, and to induce them to purchase shares of the stock of Comstock, Ltd., omitted to disclose to investors material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, including the following:
>
> "(a) That there was no free and open market for the shares of Comstock, Ltd., and that the then existing price at which such stock was sold by H. Carroll & Co., was maintained, dominated and controlled by the defendants Howard P. Carroll and H. Carroll & Co.
>
> "(b) That the major part of the shares of Comstock, Ltd. sold to investors by the defendants was obtained at 25 cents per share from a block of 500,000 shares of Comstock, Ltd., placed in a Denver, Colorado, escrow account.
>
> "(c) That Country Club Charcoal Corporation had never made any profits and had not paid off debts incurred prior to its merger with Comstock, Ltd.
>
> "(d) That the Cloverdale quicksilver mine had been shut down in November or December of 1956.
>
> "(e) That Comstock, Ltd.'s course was not chartered by Colonel Gillenwaters.

"(f) That the projected profit per month for 1957-1958 for Comstock, Ltd. of $51,765.00 was an estimate for the future, having no valid or substantial basis in fact.

The court conceded the contention of the government that a failure to disclose that there was no free and open market for the shares of Comstock, Ltd. was a material matter (R. 797). This would be true only upon proof that "no free and open market" did in fact exist.

Counts One, Five, and Six were singled out for attack on the basis of being barred by the statute of limitations in the argument of the motion for judgment of acquittal, since the sales and the fraud which was allegedly perpetrated, if any, was completed more than five years prior to the filing of the indictment. In considering the issue of the statute of limitations, the court found that the stock which was the subject of Counts One, Five, and Six had been delivered within the five-year statutory period.

The record reflects that the check and confirmation slip evidencing the sale and payment charged in Count One occurred on May 7 of 1957 and May 10 of 1957 (Exhibits 54 and 55). No evidence existed as to any transaction within five years prior to May 23, 1962, other than the signing of a receipt of the stock certificate by Robert Wisda after the sale had been closed and the stock delivered (R. 779).

The same factual situation existed as to Count Five, where Exhibits 66 and 67 showed a receipt for stock on June 19, 1957, by Mr. Bloemsma, who could not remember anything regarding the sale or purchase at all (R. 605).

Mr. Indorff, who was the subject of Count Six in the indictment, identified an order blank that bore the date of May 6, 1957 (Exhibit 58) (R. 595). He also testified as to a receipt for payment of the shares on May 6 of 1957 (Exhibit 59) (R. 593). Subsequent to the purchase and sale he said that he had received a stock certificate (Exhibit 64) (R. 597) through the mails in an envelope (Exhibit 60) that bore the name of H. Carroll & Co. (R. 594).

After hearing argument on the issues relating to the sufficiency of the proof to sustain the indictment, the court instructed the jury and refused to give favorable instructions to the defendants, because defense counsel had asked that he be informed as to what the instructions were, in accordance with Rule 30, Federal Rules of Criminal Procedure (R. 904). After argument was held and the instructions given to the jury, the defendants were both convicted on all counts, including Count Five, which involved Mr. Bloemsma, who could not recall any of the events or any of the representations that were made relative to his purchase of stock from a salesman of H. Carroll & Co.

STATEMENT OF POINTS

POINT ONE

THE TRIAL COURT ERRED IN ADMITTING EXHIBIT 22 AFTER TIMELY OBJECTION WAS MADE, IN THAT EXHIBIT 22 WAS HEARSAY AS TO THE DEFENDANTS HOWARD P. CARROLL AND H. CARROLL & CO.

POINT TWO

THE TRIAL COURT ERRED IN ALLOWING CORPORATE RECORDS OF CORPORATIONS WHICH DID NOT APPEAR AS PARTIES DEFENDANT TO BE ADMITTED AS EVIDENCE AGAINST THE DEFENDANTS, AFTER TIMELY OBJECTION WAS MADE, WHEN SUCH RECORDS WERE NOT MATERIAL, RELEVANT, OR COMPETENT AND WERE NOT CONNECTED TO THE DEFENDANTS IN ANY WAY AND WERE NOT ADMISSIBLE UNDER THE FEDERAL BUSINESS RECORDS AS EVIDENCE ACT, 28 U.S.C. 1732, AND NO PROPER FOUNDATION WAS LAID.

(a) THE DEFENDANTS WERE PREJUDICED BY THE ADMISSION OF THE NEVADA TRANSFER AGENCY RECORDS (EXHIBITS 28, 29, 30 AND 31).

(b) THE DEFENDANTS WERE PREJUDICED BY THE ADMISSION OF RECORDS OF CHEVRIER & CO. (EXHIBITS 18 AND 104).

POINT THREE

THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF HOWARD SILLICK TO BE ADMITTED AS TO HIS COMPUTATIONS AND AS TO ALL MATTERS CONTAINED IN EXHIBITS 105 AND 106 (CHARTS PREPARED BY HOWARD SILLICK), IN THAT FACTS AND MATERIALS WERE RELIED UPON IN

THE PREPARATION OF SUCH EXHIBITS WHICH WERE EITHER NOT IN EVIDENCE OR WERE INADMISSIBLE AND WERE NECESSARILY HEARSAY AS TO THE DEFENDANTS.

POINT FOUR

THE DEFENDANTS WERE PREJUDICED WHEN THE UNITED STATES ATTORNEY CONTINUALLY AND REPEATEDLY ASKED LEADING QUESTIONS TO EVERY PROSECUTION WITNESS, OVER THE COURT'S WARNING AND AFTER CONTINUED AND REPEATED OBJECTIONS WERE MADE.

POINT FIVE

THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANTS' MOTION FOR A JUDGMENT OF ACQUITTAL AS TO COUNTS ONE, FIVE, AND SIX OF THE INDICTMENT, IN THAT THE EVIDENCE PRESENTED AND THE CHARGES MADE IN THE INDICTMENT RELATING TO SUCH COUNTS WERE BARRED BY THE STATUTE OF LIMITATIONS. 18 U.S.C. 3282.

POINT SIX

THE TRIAL COURT ERRED IN DENYING THE DEFENDANTS' MOTION TO STRIKE THE SURPLUSAGE APPEARING IN THE INDICTMENT AND THEREBY PREJUDICED THE DEFENDANTS.

POINT SEVEN

THE TRIAL COURT ERRED IN ALLOWING RALPH FRANK TO TESTIFY, AFTER TIMELY OBJECTION, AS TO A TELEPHONE CALL WITH WARD DAWSON, WHICH WAS MADE OUT OF THE PRESENCE OF THE DEFENDANTS AND WAS NOT CONNECTED TO THE DEFENDANTS IN ANY WAY.

POINT EIGHT

THE COURT ERRED IN ADMITTING EXHIBIT 1 AFTER TIMELY OBJECTION WAS MADE.

POINT NINE

THE TRIAL COURT DENIED THE DEFENDANTS A FAIR TRIAL BY CONSTANTLY AND CONTINUOUSLY INTERRUPTING THE WITNESSES TO PROPOUND THE COURT'S OWN QUESTIONS AND IN CONSTANTLY ASSISTING THE UNITED STATES ATTORNEY IN THE PRESENTATION OF THE PROSECUTION'S CASE.

POINT TEN

THE TRIAL COURT PREJUDICED THE RIGHTS OF THE DEFENDANTS AND DENIED THE DEFENDANTS A FAIR TRIAL BY REQUIRING DEFENSE COUNSEL TO MAKE LEGAL ARGUMENTS ON THE ADMISSIBILITY OF EVIDENCE IN THE PRESENCE OF THE JURY.

POINT ELEVEN

THE TRIAL COURT ERRED IN ELECTING NOT TO GIVE INSTRUCTIONS THAT WERE FAVORABLE TO THE DEFENDANTS, BECAUSE DEFENSE COUNSEL, IN COMPLIANCE WITH RULE 30, FEDERAL RULES OF CRIMINAL PROCEDURE, REQUESTED THAT THEY BE INFORMED OF THE INSTRUCTIONS WHICH THE COURT WOULD GIVE OR THE ACTION WHICH THE COURT WOULD TAKE ON THE INSTRUCTIONS TENDERED BY THE PROSECUTION AND THE DEFENSE.

POINT TWELVE

THE JURY'S VERDICT IS NOT SUPPORTED BY SUBSTANTIAL OR COMPETENT EVIDENCE WHICH WOULD ESTABLISH THE DEFENDANTS' GUILT BEYOND A REASONABLE DOUBT, AND THE DEFENDANTS WERE ENTITLED TO

A JUDGMENT OF ACQUITTAL AS A MATTER OF LAW.

POINT THIRTEEN

THE CUMULATIVE EFFECT OF EACH AND ALL OF THE ERRORS COMPLAINED OF WAS TO DENY THE DEFENDANTS A FAIR AND IMPARTIAL TRIAL.

A R G U M E N T

POINT ONE

THE TRIAL COURT ERRED IN ADMITTING EXHIBIT 22 AFTER TIMELY OBJECTION WAS MADE, IN THAT EXHIBIT 22 WAS HEARSAY AS TO THE DEFENDANTS HOWARD P. CARROLL AND H. CARROLL & CO.

A letter on the letterhead of the law firm of Wainwright and Fleischell, 841 Flood Building, San Francisco 2, California, was marked as Exhibit 22 and was admitted into evidence as a business record under the authority of 28 U.S.C. 1732. The letter bears the date of October 18, 1957, and was addressed to the Securities and Exchange Commission, Regional Office, Room 339, 821 Market Street, San Francisco, California. Marvin Greene, who was then an employee of the Securities and Exchange Commission, was the person to whom the letter was directed (R. 462). He testified that he received the letter in the mail after he had requested information from Mr. Fleischell. J. Edward Fleischell was not identified as an attorney for either of the defendants or connected in any way with the defendants or any other person who had an interest in any of the transactions

which involved Comstock, Ltd. or H. Carroll & Co. The letter listed certain Comstock, Ltd. certificate numbers, the number of shares represented thereby, and the names of the persons he was told were record owners thereof. Exhibit 22 was obtained as part of the investigative effort of the Securities and Exchange Commission and used to determine the number of shares of Comstock, Ltd. stock that was sent by various people to the Securities Transfer Corporation to carry out an agreement between Archie Chevrier and David Alison. Apart from the certificate numbers and number of shares involved, the letter stated:

> "Dear Mr. Greene:
>
> "I have just received this morning the following list of certificates of the common stock of Comstock, Ltd. which you have requested. They read as follows:
>
> . . . .
>
> "You will note that the total is 495,266 shares. I believe that the difference between the figure and the 500,000 were other certificates not known to Mr. Alison. In the event we can assist you further, please be assured that we will cooperate in every way.
>
> "Very truly yours,
>
> WAINWRIGHT AND FLEISCHELL
>
> By J. Edward Fleischell"

The author of the letter did not appear as a witness, and counsel for the defense had no opportunity for cross-examination. The foundation for the admission of Exhibit 22 was Marvin Greene's testimony that he had received Exhibit 22 in the mail

and that it was part of the files of the Securities and Exchange Commission. Exhibit 22 was objected to on the basis of the incomplete and improper foundation which was laid and for the further reason that the letter was hearsay (R. 465). By the very terms of the letter, the data contained therein was based upon information supplied to Mr. Fleischell by a person or persons unknown and was, therefore, hearsay on hearsay.

The authenticity of the matters set forth in Exhibit 22 does not appear from any other exhibit and is not established by the testimony of any witness. To determine whether Exhibit 22 was properly admitted, it is necessary to determine whether the exhibit falls within the Federal Business Records as Evidence Act which provides an exception to the hearsay rule and relates to the competency of evidence. 28 U.S.C. 1732.

Obviously, the admission of Exhibit 22 was proper if a proper foundation was laid and if the exhibit is the type and kind specified and excepted in 28 U.S.C.A. 1732. 28 U.S.C.A. 1732 provides as follows:

> "Record Made in Regular Course of Business. In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event of such act, transaction, occurrence, or event, if made in regular course of any business and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter. . . ."

The breadth of the Act has been recognized in many cases, but every document or paper which is offered as evidence does not fall within the Act. Before any writing or record may be admitted, it must be made as a memorandum or a record of an act or transaction in the regular course of business and as part of the regular course of that business. The further requirement exists that the memorandum must be of a type that was made in the regular course of such business and at the time of the act or transaction which it purports to show or a reasonable time thereafter. In Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, 144 A.L.R. 719 (1943), the use of accident reports kept by a railroad company and statements taken by the railroad of its engineer in the ordinary course of business was condemned. The railroad's argument was predicated on the fact that the engineer who had given the statement had died. In the Palmer case, the Court refused to accept the premise that the statement was made in the regular course of business within the meaning of 28 U.S.C. 695, which was the predecessor to the present statute. The Supreme Court found that the statement complained of was not a record which was made in the systematic conduct of the business as a business. The mere maintenance of records relating to the railroad's investigation of an accident and its employee's version of an accident did not make a statement admissible. The trustworthiness required by the Business

Records Act, in the opinion of the Court, stems from the routine reflection of daily business. Accord, United States v. Plisco, 192 F. Supp. 339 (D.C.D.C. 1961).

In following Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, 144 A.L.R. 719 (1943), this Circuit has had occasion to strike down two efforts to go beyond the intent of the statute. In a civil antitrust suit by a gasoline retailer against various major oil companies for treble damages under the Sherman Antitrust Act and its various counterparts, the trial court allowed the admission of various exhibits which the plaintiff obtained by his use of the discovery rules. The exhibits, which were questioned on appeal were letters, telegrams, memoranda and reports, and were admitted under the theory that the exhibits fell within the liberal construction of 28 U.S.C.A. 1732. Standard Oil Company v. Moore, 251 F.2d 188 (9th Cir. 1957). In reversing, Judge Hamley, speaking for a unanimous Court, held that the mere fact that a letter had come from the file of a corporation did not, without more, render it admissible. The Court condemned the fact that some of the letters contained information which the writer attributed to others. The Court held that the duty to make the memorandum in the regular course of business did not exist as to most exhibits. The error was held to lie not only in the admission of hearsay evidence, but also in the fact that the records were not kept in the course

of business. Accord, N.L.R.B. v. Sharpless, 209 F.2d 645 (6th Cir. 1954); Bisno v. United States, 299 F.2d 711 (9th Cir. 1961).

Of like effect is Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958), where the Ninth Circuit again looked to the breadth of the Business Records Statute in determining whether or not the Court had properly admitted the minutes of a corporation which had made a loan to the defendant in a tax evasion case. On appeal, after conviction, the defendant taxpayer was held not to be bound by the book entry of the corporation which made the loan to him to purchase the stock in question. In so holding, the Court found that the taxpayer had not assented to the correctness of the books. The Court, in reversing, said, in considering the minutes which were admitted over objection:

> ". . . Even if this document were admissible, it laid no foundation for the introduction of the minutes of an executive committee of A.B.C. Delaware as against taxpayers who were not present, even according to the purported minutes.*3 The whole recorded transaction was one between the parent corporation and its Oregon subsidiary. There was no proof that the record was made

*3The records of a corporation 'are not competent evidence against third persons to prove contracts with them in the absence of proof that they knew and assented thereto.' Oregon & C.R. Co. v. Grubissich, 9 Cir., 206 F. 577, 580. The expression 'not necessary to decision,' in the following case is pat: 'Corporate books of account are not competent against a stranger merely because they are the books of the company whose dealings they purport to record.' United States v. Fineberg, 2 Cir., 140 F.2d 592, 596, 154 A.L.R. 272.

in the regular course of business.*4 No witness testified as to the authenticity.*5

*4The case of Bruce v. McClure, 5 Cir., 220 F.2d 330, 335, contains the following quotation from 65 A.L.R.: 'The general rule is that before the books of a corporation are admissible in evidence, their authenticity must be shown. It must be made to appear that they are the books of the corporation, that they have been kept as its records, and that the entries made therein were made by the proper acting officer for that purpose. . . .'

*5There was a stipulation which established that the record was that of the parent company, that it was in appropriate custody and that it was the true record of the meeting which it purported to record, but this stipulation did not cure the other defects pointed out or make it competent, relevant, or material against taxpayer. See, Parish's Estate v. C.I.R., 187 F.2d 390, 395-396." Niederkrome v. C.I.R., 266 F.2d 238, 241.

A case even more squarely in point is Smith v. Bear, 237 F.2d 79 (2nd Cir. 1956), 60 A.L.R.2d 1119, where the plaintiff sued his stockbroker for an alleged breach of duty under the Federal Securities Act and sought to introduce into evidence a memorandum relating to an oral agreement which contravened the contract requirements set forth in his contract to purchase. In upholding the trial court's refusal to admit a memorandum relating to the plaintiff's efforts to vary his written contract with his broker by parol, the Court found that a luncheon memorandum which was dictated by a bank officer relating to the investment complained of and his impressions, as well as other facts, was inadmissible and did not constitute a record kept in the ordinary course of business, because it was not the bank officer's

duty to make the record.

To add to the prejudice that resulted to the defendants from the admission of Exhibit 22, this Court must recognize the fact that the letter was part of the investigation of the Securities and Exchange Commission and was, in effect, the same as a police report, which is uniformly excluded. 5 Wigmore, Evidence (3rd ed.) §§1670,1672; Yates, Evaluative Reports by Public Officials, 30 Texas L.Rev. 112 (1951). The error promulgated by the admission of the reports of a criminal investigation and the memoranda made incident thereto was also pointed out by the Court in Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954), and in United States v. Rothman, 179 F.Supp. 935 (D.C. Pa. 1959).

It is respectfully submitted that the admission of Exhibit 22 was prejudicial error and that the government's entire case must fall if Exhibit 22 is inadmissible. The importance of Exhibit 22 to the government's case becomes apparent when the admission of Exhibit 105 is considered in the light of the fact that the foundation for the admission of Exhibit 105 was admitted to be Exhibit 22 (R. 751), and when the entire tracing process relating to the investor witnesses named in each Count hinges upon the accuracy of the unsworn statements contained in Exhibit 22 (R. 751-756).

POINT TWO

THE TRIAL COURT ERRED IN ALLOWING CORPORATE RECORDS OF CORPORATIONS WHICH DID NOT APPEAR AS PARTIES DEFENDANT TO BE ADMITTED AS EVIDENCE AGAINST THE DEFENDANTS, AFTER TIMELY OBJECTION WAS MADE, WHEN SUCH RECORDS WERE NOT MATERIAL, RELEVANT, OR COMPETENT AND WERE NOT CONNECTED TO THE DEFENDANTS IN ANY WAY AND WERE NOT ADMISSIBLE UNDER THE FEDERAL BUSINESS RECORDS AS EVIDENCE ACT, 28 U.S.C. 1732, AND NO PROPER FOUNDATION WAS LAID.

(a) THE DEFENDANTS WERE PREJUDICED BY THE ADMISSION OF THE NEVADA TRANSFER AGENCY RECORDS (EXHIBITS 28, 29, 30 AND 31).

Counsel for the defense stipulated that Exhibits 28, 29, 30, and 31 were obtained from the Nevada Transfer Agency and were part of the records of that company (R. 649). After the stipulation was made, the Court inquired whether foundation was being waived, and was informed that the foundation was not being waived (R. 649, 651). Whereupon the Court then, without further foundation, admitted the exhibits. The exhibits in question were admitted over the objection that they were not the best evidence and had no pertinence or materiality as to Howard P. Carroll or H. Carroll & Co. and were hearsay as to both defendants. The United States Attorney stated that they were being offered to establish the flow of stock of Comstock, Ltd. during the periods set forth in the indictment. No evidence was

offered to show the authenticity of the records or the manner in which the records were kept. At the time of the admission of the exhibits, the trial court was made aware of this Court's landmark decision in Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958), but admitted the records in spite of the decision (R. 651). Exhibit 28 is a book of cancelled stock certificates and other documents, including transfer instructions from various parties covering the period from June 1955 through June of 1957 and containing certificates numbered 1716 to 2672, inclusive, of Comstock, Ltd. Exhibit 29 is a similar book of stock certificates and various transfer requests covering the period of July 1957 through October of 1957, and containing certificates numbered 2673 to 3290, inclusive, of Comstock, Ltd. Similarly, Exhibit 30 is comprised of certificates numbered 3291 to 3513, inclusive, of Comstock, Ltd. and is for the period of November through September of 1962.

One additional exhibit was obtained from the Nevada Transfer Company and bears the identification number of Exhibit 31. The exhibit is entitled, "Numerical Control Ledger Sheets." The exhibit, when examined, refers to many matters which are not in evidence and which have never been explained. For example, as to certificates numbered 2014, 2019, 1757, 1905, and 2501, the notation appears, "see transfer." All of these exhibits were offered as being admissible under the Business Records as

Evidence Act, 28 U.S.C.A. 1732.

No witness testified as to the authenticity of the Nevada Transfer Agency records or to the manner in which they were kept. In Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958), a similar stipulation was dealt with and held to be an insufficient foundation to allow the admission of the corporate records. In Niederkrome v. C.I.R., 266 F.2d 238, 241 (9th Cir. 1958), the stipulation was set out in footnote 5:

> "5. There was a stipulation which established that the record was that of the parent company, that it was in appropriate custody and that it was the true record of the meeting which it purported to record, but this stipulation did not cure the other defects pointed out or make it competent, relevant, or material against taxpayer. See, Parish's Estate v. C.I.R., 187 F.2d 390, 395-396."

It is clear that the records of a corporation are not competent evidence against a third person to prove contracts with them in the absence of proof that they knew and assented to the records. Oregon & C. R. Co. v. Grubissich, 206 Fed. 577, (9th Cir. 1913). No such proof appears in the record to bind either of the defendants.

The Niederkrome case, supra, also quoted with approval United States v. Feinberg, 140 F.2d 592 (2d Cir. 1944), 154 A.L.R. 272, where the Second Circuit reviewed the same problem and said that corporate books of account are not competent against a stranger merely because they are the books of the company whose dealings they purport to record. Moreover, the

records when examined are not complete and refer to matters which were not before the trial court such as "see transfer" or by other reference. Exhibit 31. No testimony was presented to show that the transactions appearing in Exhibits 28, 29, 30, and 31 represented unlawful transactions, sales or any matters which could lead or tend to show the guilt of the defendants or either of them.

Therefore, it is apparent that Exhibits 28, 29, 30 and 31 should not have been admitted.

(b) THE DEFENDANTS WERE PREJUDICED BY THE ADMISSION OF RECORDS OF CHEVRIER & CO. (EXHIBITS 18 AND 104).

Exhibit 18 and Exhibit 104 were both obtained by William Ziering from Archie Chevrier (R. 621). The records related to the account maintained by H. Carroll & Co. with Chevrier & Co. and Archie Chevrier and were taken by Mr. Ziering from a storeroom in the basement of the San Francisco Mining Exchange. Initially, Exhibit 18 included the matters that were separated and designated as Exhibit 104. No chain of custody was established as to the exhibits after they were taken by Mr. Ziering. Exhibit 18 was identified by Mr. Ziering, who was a member of the staff of the Securities and Exchange Commission and served as co-counsel with the United States Attorney in the trial of the case. He took the stand and endeavored to lay a foundation

for the admission of the exhibits by saying that they were the records of Archie Chevrier relating to H. Carroll & Co. The defendants' objection resulted in rather extended argument which brought about the following colloquy:

> "THE COURT: What does that prove, counsel? Was Mr. Chevrier a member of Comstock, Ltd., or was he a member of Carroll & Company? That's the question. How do you connect it up with the Comstock Corporation or with the Carroll & Company corporation or with the defendant Carroll?
>
> "MR. MITCHELL: The records on the face of those particular records --
>
> "MR. ERICKSON: Your Honor, I object to this in the presence of the jury, your Honor.
>
> "THE COURT: The jury will be instructed to disregard what's being said. This is not evidentiary whatsoever. This is purely a discussion for the purpose of trying to conserve time.
>
> "I think you have got to make another effort, counsel. You had better take up something else. I'm afraid I can't admit them on just that basis alone. You have to connect them in some way.
>
> "MR. MITCHELL: Connect them to Mr. Chevrier or to the defendant H. Carroll & Company and Mr. Carroll?
>
> "THE COURT: Counsel, no matter what a record may say on its face, you have to show that the records came from a source, and then connect that in some way with the defendants here. Just the fact that it states on the face something about Carroll & Company does not prove it. That's your problem, and I think you might as well find a way to do it. I think maybe you had better get busy on that this evening and take up something else in the meantime. Do not try to figure it out now. I know you wouldn't be able to. Go upstairs and talk to your associates and figure it out. Can't you take up something else now?" (R. 623-624.)

Thereafter, both exhibits were admitted. Exhibit 18 had as a foundation for its admission the testimony of Liboslav Uhlir, who was a former employee of H. Carroll & Co. He testified that he saw Exhibit 18 for the first time just before he took the stand and that the confirmation slips contained in Exhibit 18 were the type that passed across his desk when he worked for H. Carroll & Co. (R. 707). The admission of Exhibit 18 came about in this manner:

> "THE COURT: Pardon the interruption. Is this the same type of confirmation that passed across your desk?
>
> "THE WITNESS: Well, a copy of it.
>
> "THE COURT: All right, they are admitted.
>
> "MR. ERICKSON: I object. Your Honor, I would like some questions on voir dire.
>
> "THE COURT: I'll give you the privilege. I will withhold the admission until you make your voir dire questions and your objection." (R. 707.)

On voir dire, Mr. Uhlir admitted that he did not prepare any of the confirmation slips or items which he identified as Exhibit 18. He also admitted that he could not identify any one of the slips and that he did not know where the slips came from (R. 708). Thereafter, the court said:

> "I can tell you in advance, I'm going to admit them. You made your objection." (R. 710.)

The court also said that it thought that sufficient foundation had been laid to connect the exhibits with the operation of H.

Exhibit 104 was admitted when Gaither Loewenstein said, in response to the court's questions, that he had been an employee of Chevrier & Co. and that the items comprising Exhibit 104 were part of the records of Chevrier & Co. (R. 728.)

Both exhibits were admitted on the basis of the court's questions and over the defense objection that no foundation was laid and that the records of Chevrier & Co. were not material, relevant, or competent to prove any matter or issue in the case (R. 729).

Exhibit 104 contained bank drafts, notices, confirmation slips, and delivery tickets of Chevrier & Co. Transactions reflected by Exhibit 104 related to purchases by H. Carroll & Co. of Comstock, Ltd. stock, as agent, over the San Francisco Mining Exchange (R. 723). Both Exhibits 18 and 104 were woefully lacking in a foundation to establish that they were in the same condition at the time they were offered as when they were kept by Chevrier & Co. or that they were complete. The chain of custody and the foundation for both exhibits were not established. United States v. Gondron, 159 F. Supp. 691 (D.C.S.D. Texas 1958); 2 Wharton, Criminal Evidence, 11th Ed., Section 757; 20 Am. Jur., Evidence, Section 719; see also, Penden v. United States, 223 F.2d 319 (D.C. Cal. 1955).

Moreover, both exhibits were improperly admitted, if Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958), has any meaning. See also, Feinberg v. United States, 140 F.2d 592 (2nd Cir. 1944).

It is respectfully submitted that the admission of Exhibits 18 and 104 prejudiced the defendants and constituted an overextension of the Federal Business Records as Evidence Act. 28 U.S.C.A. 1732.

POINT THREE

THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF HOWARD SILLICK TO BE ADMITTED AS TO HIS COMPUTATIONS AND AS TO ALL MATTERS CONTAINED IN EXHIBITS 105 AND 106 (CHARTS PREPARED BY HOWARD SILLICK), IN THAT FACTS AND MATERIALS WERE RELIED UPON IN THE PREPARATION OF SUCH EXHIBITS WHICH WERE EITHER NOT IN EVIDENCE OR WERE INADMISSIBLE AND WERE NECESSARILY HEARSAY AS TO THE DEFENDANTS.

FOUNDATION FOR THE ADMISSION OF EXHIBIT 105 AND EXHIBIT 106.

Exhibit 105 and Exhibit 106 were charts prepared by Howard Sillick, an accountant employed by the Securities and Exchange Commission, wherein he summarized certain exhibits and matters which he had obtained in his investigation (R. 739-777). Exhibit 105, according to Howard Sillick, was a recapitulation of certain information that he obtained from Exhibit 22 and from the Nevada Transfer Agency records (Exhibits 28, 29, 30, and 31) (R. 741). See Exhibit 104 (confirmation slips of Chevrier & Co.) (R. 729), and Exhibits 32, 33, 34, and 74 (quotation sheets on San Francisco Mining Exchange) (R. 662).

Exhibit 106 was a chart which reflected the number of shares of Comstock, Ltd. stock which was traded on the San Francisco Mining Exchange from March to June of 1957 and the number of shares of stock delivered by Chevrier & Co. to

H. Carroll & Co.

Mr. Sillick testified that the chart, which was marked as Exhibit 105, was a compilation of certain figures from the enumerated exhibits which showed the flow of stock certificates and their transfer by the Nevada Transfer Agency (R. 742). He admitted on direct examination, when questioned by the court, that he obtained the information to put on the chart from the Nevada Agency & Trust Company in response to a certain letter which he had written (R. 742). The chart was offered apparently to show the previous record owner of stock purchased by the investor witnesses named in the Six Counts of the Indictment who testified at the trial (R. 742). Thereafter, the Assistant United States Attorney admitted that Exhibit 22 was the only basis upon which a tracing could be made (R. 744) of the shares in the names of Arnold Towes, Archie Chevrier, and others, which were eventually transferred to the investor witnesses (R. 750-751).

On cross-examination, Mr. Sillick admitted that he did not know whether the matters contained in Exhibit 22 were true or false (R. 768). He also admitted that all of the figures contained on Exhibit 105 represented transactions which were executed through Archie Chevrier (R. 769). He summarized the exhibit as being a list of stock transfers which he had taken from the records of the Nevada Transfer Agency and Exhibit 22. He

also stated that in preparing Exhibits 105 and 106 certain matters had to be clarified and that he had written to the Nevada Agency & Trust Company for information which he had used in his compilation (R. 770-771). Upon the admission being made that documents not in evidence were used in the preparation of Exhibits 105 and 106, a motion to strike both exhibits was made and denied (R. 771).

Exhibit 106, Mr. Sillick said, was a chart that he prepared from Exhibits 32, 33, 34, and 79 (San Francisco Mining Exchange quotation sheets for the months of March, April, May, and June of 1957, showing the bid and asked price for Comstock, Ltd. stock and the number of shares of stock sold on the Exchange on each day during the period), and Exhibit 104 (records of Chevrier & Co.) (R. 761). Mr. Sillick said that Exhibit 106 indicated the number of shares purchased on the San Francisco Mining Exchange (R. 756-757), and that the information relating to the transfers was given to him by Mr. Ziering (R. 757), and caused the court to say:

> "You just testified that you got these from these exhibits. Now you are saying you got it from Mr. Ziering." (R. 758.)

In response to the court's question, he also said:

> "Most of these figures [on Exhibit 106] were obtained from compilation -- the compilation of these figures was obtained from a list given to me by Mr. Ziering." (R. 758.)

He said that some of the information was obtained from the delivery tickets of Chevrier & Co. which were made out to H. Carroll & Co. and were obtained in Exhibit 104 (R. 758).

Both exhibits were admitted over objection. The objection to the admission of the exhibits in question was that no proper foundation was laid for their admission and both exhibits were incompetent and immaterial as to the defendants on trial (R. 575, 763, 768).

EXHIBIT 105.

In considering the particular disadvantage that a defendant must face when charged with an economic crime of the type in issue, it is necessary to determine just what the limitations are in the use of a chart and summary such as Exhibit 105.

In Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954), the defendant Hartzog was convicted of the criminal evasion of income taxes. The question before the Court of Appeals was whether the admission of work sheets of two government agents prejudiced the defendant. One agent died and the other based his work sheets partly on the work of the other. In reversing, the court found that prejudicial error occurred when part of the records relied upon for conviction were based on hearsay and were not admissible. In the Hartzog case, the government claimed that the evidence was admissible under 28 U.S.C.A. 1732 or 1733, but the court held that the preparation of the exhibit

in question was for the purpose of trial and said, speaking through Judge Dobie:

> "The legislative history of Section 1732 gives ample support to the construction of the section. See Sen. Rep. No. 1965, 74th Cong. 2d Sess. (1936). This section was enacted to provide a relaxing of the strict commonlaw rule requiring identification of book entries by all parties making them. It is clear that Congress did not intend to do away with the requirement that the record to be admissible, must carry with it some guarantee of trustworthiness. See Gordon v. Robinson, 3 Cir., 210 F.2d 192; Hoffman v. Palmer, 2 Cir., 129 F.2d 976, affirmed 318 U.S. 109, 63 S. Ct. 477, 87 L.Ed. 645.
>
> "On the record presented to us, it does not appear that the worksheets prepared by Baynard were prepared under such circumstance as will provide a guarantee of worthiness. These worksheets were made in preparation for this prosecution; they were Baynard's personal working papers, were the product of his judgment and discretion and not a product of any efficient clerical system. There was no opportunity for anyone, especially Berlin, to tell when an error or misstatement had been made. These worksheets were no more than Baynard's unsworn, unchecked version of what he thought Hartzog's records contained. Applying the criterion of the Hoffman case, that admissibility is to be determined by 'the character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation,' 318 U.S. at page 114, 63 S.Ct. at page 480, we hold that these worksheets were inadmissible as evidence of the truth of their contents. (Citing cases.)" Hartzog v. United States, 217 F.2d 706, 710 (4th Cir. 1954).

Thus, without factual testimonial foundation, Exhibit 105 cannot stand.

It cannot be questioned that the use of a summary is proper, but all evidence used in the preparation of the summary must be before the Court and available to counsel at the time the expert

accountant or witness offers his testimony regarding the exhibit.

In Corbett v. United States, 238 F.2d 557 (9th Cir. 1956), the use of a chart and summary was upheld where no question was raised as to the correctness of any material used by the expert. There, in stating the requirements by way of foundation and the limitation on the use of charts, Judge Tolin said:

> "Computation and summaries by expert accountants has long been allowed for the use of juries in this type of case. It was specifically approved by the Supreme Court in United States v. Johnson, 319 U.S. 503, 63 S. Ct. 1233, 87 L.Ed. 1546. Among safeguards which must be applied are procedural methods which bring before the jury the basic evidence which is summarized; also, that broad scope of cross-examination be permitted in order that the accuracy of the accountant's summary may be tested. It must be made clear to the jury that such testimony and charts are but summaries of other evidence and that the jury should examine the basis upon which summarization rests, for it is not primary evidence at all, but, instead, a gathering together an accounting classification of primary evidence." Corbett v. United States, 238 F.2d 557, 558. See also, Noell v. United States, 183 F.2d 334 (9th Cir. 1950).

It is thus clear that if Exhibit 22 was improperly admitted, Exhibit 105 was not properly admitted in evidence. As to the weight that the jury gave to the Exhibit, we can but speculate. An examination of Exhibit 105 will show that there are also other deficiencies in the chart. Consider, for example, the Johnson transaction where reference is made on Exhibit 105 to Exhibit "A," which was not identified by Howard Sillick. Consider also the fact that Certificate No. 2713 is not set out on

Exhibits 22 or 27 and does not even appear in the Nevada Transfer Agency ledger (Exhibit 31) and must, therefore, be hearsay.

The summary made by Sillick as to Willard and Margaret Johnson leaves the date blank, provides a certificate number, and then says "refer Exhibit A." The only Exhibit "A" which is in evidence is a license to remove and cut timber, which could not possibly give a tracing right to Certificate No. 2713, and thus again adds to the frailty of Exhibit 105.

A further objection exists inasmuch as the notation appears opposite Archie Chevrier that a certificate for 50,000 shares exists, with the notation "Ctf. not recorded," and must necessarily have been based on exhibits not in evidence or hearsay.

The Securities and Exchange Commission expert, Howard Sillick, said that Exhibit 105 was prepared by the compilation of data taken from Exhibit 22, Exhibit 104, and Exhibits 28, 29, 30, and 31 (R. 741). If any of the exhibits were admitted erroneously, Exhibit 105 cannot stand. It is clear that the admission of Exhibit 22 was error, and an analysis of Exhibits 28, 29, 30, and 31 (also admitted in error) will show that the exhibits in question could not provide the information which Howard Sillick used to prepare Exhibit 105.

It is respectfully submitted that the summary was based on matters not in evidence and gave a badge of authenticity

to a compilation of inferences and the inadmissible conclusions of Howard Sillick as to a tracing of stock to the investor witnesses named in the indictment.

EXHIBIT 106

Exhibit 106, prepared by Howard Sillick, contains two columns; the first of which is entitled, "Number of Shares Traded on San Francisco Mining Exchange," and the second bearing the caption "Number of Shares Delivered by Chevrier to Carroll & Co." Mr. Sillick testified that he determined the number of shares traded over the San Francisco Mining Exchange from March to June of 1957 by summarizing Exhibits 32, 33, 34, and 79. It is too plain for cavil that the summary of the transactions on the San Francisco Mining Exchange were not all connected to the defendants and were, therefore, immaterial, in large part.

Moreover, the "Number of Shares Delivered by Chevrier to Carroll & Co." in the right hand column can have no relevancy or materiality, for delivery in the securities business is not synonymous with sale or purchase. An examination of Exhibit 104 will disclose that the majority of the purchases made by H. Carroll & Co. were not for the account of H. Carroll & Co., but only purchases made for others.

The confirmations from which Exhibit 104 was prepared acknowledge both purchases through A. H. Chevrier & Co. by

H. Carroll & Co., and in an isolated instance, a sale by H. Carroll & Co. to A. H. Chevrier & Co. The material portion of Exhibit 104, as it relates to the transaction in question, is the confirmations by Chevrier & Co. to H. Carroll & Co. Significantly, each of these confirmations shows that shares of stock of Comstock, Ltd. were "bought for your account and risk" as "agent." It is impossible to determine from the confirmations from A. H. Chevrier & Co. to H. Carroll & Co. whether or not H. Carroll & Co. was purchasing for its own account or for the account of another as agent. Some of the items appearing on Exhibit 104 appear by way of reciprocal confirmations which are reflected in Exhibit 18. (Confirmations of H. Carroll & Co. taken from records of A. H. Chevrier & Co.) An analysis of Exhibit 104 discloses that approximately 88,000 shares of stock of Comstock, Ltd. were either purchased or acquired for the accounts of others by H. Carroll & Co. (Exhibit 18 shows a total of 88,200 shares, whereas Exhibit 104 totals 88,000 shares.) Out of the 88,200 shares reflected in Exhibit 18, only 12,500 shares were acquired as principal. The balance of 75,700 being "bought from you [Chevrier & Co.] as broker [agent] for buyer," or "We confirm purchase through you as agent," or, in two instances, "Sold for your account as agent. In this transaction we are acting as agent of both buyer and seller." Thus, it is apparent that the materiality of both Exhibits 104 and 106 must be questioned.

A careful examination of Exhibit 106 and Exhibit 104 will disclose another reason why the exhibit should not stand. Exhibit 106, according to testimony offered by Mr. Howard Sillick, was prepared only from evidence which had been previously admitted by the court. Exhibit 104 was the only evidence from which the delivery of stock of Comstock, Ltd. to H. Carroll & Co. by Chevrier & Co. could be ascertained.

In reviewing the delivery tickets in Exhibit 104, it becomes apparent that the figures appearing in the right hand column of Exhibit 106 cannot be correlated with Exhibit 104. Exhibit 106 was obviously prepared, as Mr. Sillick testified, from figures given to him by Mr. Ziering. A recapitulation of Exhibit 104 will show:

No. of shares delivered
By Chevrier to Carroll & Co. (Taken from Exhibit 104)

March	40,500	
April	27,500	
May	17,000	
June	2,000	87,000

and the figures reflected on Exhibit 106 in the right hand column as the number of shares delivered by Chevrier & Co. to Carroll & Co. were, according to Howard Sillick:

No. of shares delivered
By Chevrier to Carroll & Co.

March	45,500	
April	23,500	
May	16,000	
June	3,000	88,000

In reviewing the record, it must be determined whether the combined effect of the admission of the exhibits complained of substantially prejudiced the defendants' rights and led to their conviction. Todorow v. United States, 173 F.2d 439 (9th Cir. 1949), cert. denied, 337 U.S. 925, 69 S. Ct. 1169, 93 L.Ed. 1733.

Whether the defendants were prejudiced depends in part on the strength or the weakness of the government's case. Where evidence of guilt is largely circumstantial, as it was in this case, and the proof of guilt is not strong, the court cannot disregard error in admitting the exhibits as harmless. Thomas v. United States, 281 F.2d 132 (8th Cir. 1960); Thomas v. United States, 287 F.2d 527 (5th Cir. 1961).

It is respectfully submitted that the admission of Exhibit 106 was plain error and substantially prejudiced the defendants.

POINT FOUR

THE DEFENDANTS WERE PREJUDICED WHEN THE UNITED STATES ATTORNEY CONTINUALLY AND REPEATEDLY ASKED LEADING QUESTIONS TO EVERY PROSECUTION WITNESS, OVER THE COURT'S WARNING AND AFTER CONTINUED AND REPEATED OBJECTIONS WERE MADE.

David R. Alison was the first witness to be called on behalf of the government (R. 76). After a difficult start in which the court was required to object to the method of questioning by the Assistant United States Attorney (R. 86) and in which the court commenced its participation as an advocate in the trial (R. 91), a series of questions terminated in the statement by the court:

> "Now, counsel, take over." (R. 92.)

With this shaky beginning, an early objection to a question as leading was made by counsel for the defendants and was, in effect, sustained (R. 93). Early in the trial, and due to the court's apparent interpretation that a prosecution witness was adverse, without request by the government, and again after objection was made to leading questions, the court stated as follows:

> "Well, I am going to permit him to lead this witness. In fact, I am going to cross-examine the witness on the showing thus far. You may cross-examine this witness." (R. 120.)

Leading questions were thereafter asked to each and every succeeding witness. Examples of comments of the court as they

related to leading questions and their relationship to the trial appear throughout the transcript, some of which are as follows:

> "Counsel, you are leading him all over the lot." (R. 526.)
>
> "Counsel, you lead terribly." (R. 583.)
>
> "The thing that is bothersome in the case is that there is so much leading and suggestive interrogation that I had difficulty in determining whether it is the evidence of the witnesses or not . . . . And much of this evidence I am absolutely in doubt at this time as to whether or not it is the suggestion . . . . But the leading of the witness was such that I do not know whether his answers were his own testimony or whether he was just adopting the leading questions." (R. 829.)
>
> "I never dreamed a case could be so mixed up." (R. 842.)
>
> "The way the evidence has gone in this case because of the leading questions, it raises questions in my mind whether it is the testimony of the witness or whether it is the suggested testimony." (R. 847.)

Counsel for the defense on many occasions, as has been noted, objected to questions as being leading and suggestive, which objections were oftentimes overruled (R. 706). The use of leading questions, together with the right to cure an abuse which arises out of improper questions, lies within the discretion of the court, and only when an abuse is made of that discretion will the matter be considered on appeal. Gill v. United States, 285 F.2d 711 (5th Cir. 1961).

In this case, leading questions were asked to the extent that the court itself was unable to precisely determine whether or not the testimony of the witnesses was being presented or whether the testimony was simply that of the Assistant United States Attorney. Also, as a result of such questions, the court itself determined that it was necessary to interrogate many witnesses, thereby giving more weight to the questions asked by the court and the answers given than would have been given to the same questions and answers had the court not intervened. See United States v. Fry, 304 F.2d 296 (7th Cir. 1962), where similar intervention by the court was held to be prejudicial to the defendant. Inasmuch as the court was in doubt as to the state of the record as it related to testimony of witnesses, the record itself could thus not support the charge, since, as a matter of law, such doubt should be resolved in favor of the defendants.

It is respectfully submitted that the trial court erred and substantially prejudiced the defendants by not restricting the continued use of leading questions and by not requiring the United States Attorney to allow each witness to tell his own version of the complicated and disputed factual controversy before the court.

POINT FIVE

THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANTS' MOTION FOR A JUDGMENT OF ACQUITTAL AS TO COUNTS ONE, FIVE, AND SIX OF THE INDICTMENT, IN THAT THE EVIDENCE PRESENTED AND THE CHARGES MADE IN THE INDICTMENT RELATING TO SUCH COUNTS WERE BARRED BY THE STATUTE OF LIMITATIONS. 18 U.S.C. 3282.

The evidence presented, as it relates to Count One, Paragraph 4, and Counts Five and Six, is ineffective to prove a crime by reason of the statute of limitations. Title 18, U.S.C. 3282, provides as follows:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." (As amended September 1, 1954.)

In Count One, Paragraph 4, as well as in Counts Five and Six, the jurisdictional allegations charge the use of the mails in the delivery of stock certificates, after sale and payment.

The offenses alleged in the six Counts of the indictment relate to fraud in the sale of securities (Section 17(a) of the Securities Act of 1933, as amended, 15 U.S.C. § 77q(a)). The Act referred to makes certain matters unlawful "in the offer or sale of any securities" by the use of Federal jurisdictional means.

Count One purchaser, Mr. Wisda, purchased stock as was evidenced by a confirmation sent to and received by him (Exhibit 54) dated May 7, 1957 (R. 583). Mr. Wisda's check in payment for such stock was sent to the defendant company on May 10, 1957 (Exhibit 55) (R. 583, 589). Thus, a completed purchase and sale, to include an offer, acceptance and payment, occurred more than five years prior to the date on which the indictment was found. The only matter remaining to be done was the delivery of the stock certificate as evidence of ownership of the shares purchased. A receipt sent by Mr. Wisda to the defendant company, dated May 31, 1957 (Exhibit 56) (R. 585,589) acknowledged that a stock certificate in the name of Mr. Wisda (Exhibit 94) (R. 584, 585) had been received. There is no testimony establishing a date on which the certificate was sent or received, or by whom it was sent.

Mr. Bloemsma, Count Five purchaser, remembered nothing relating to his stock purchase himself. The evidence relating to Mr. Bloemsma's purchase consisted of a stipulation that Mr. Bloemsma purchased 500 shares of Comstock, Ltd. stock on April 10, 1957. Such stock was paid for (Exhibit 95) (R. 602), a stock certificate was received (Exhibit 96) (R. 602), a receipt was sent and an envelope was received (Exhibits 66 and 67) (R. 602).

Count Six purchaser, Mr. Indorff, identified an order blank dated May 6, 1957 (Exhibit 58) (R. 595), and also a receipt for

payment for such shares dated May 6, 1957(Exhibit 59)(R. 593). Thereafter, and within the five-year period, a stock certificate (Exhibit 64) (R. 597) was delivered through the mails to Mr. Indorff in an envelope (Exhibit 60) from H. Carroll & Co. (R. 594). A receipt for stock in the name of Robert W. and Robaday I. Indorff (Exhibit 61) (R. 594) was also received in evidence (R. 595) without any testimony as to what was done, if anything, with the receipt. An unrelated "customer data slip," as well as an unused envelope, were also placed in evidence (Exhibits 62 and 63) (R. 596).

The Securities Act of 1933, as amended, assists in interpreting what might be an "offer forsale" by defining the term "sale" in another section of the Act (Section 2(3) of the Securities Act of 1933, as amended, 15 U.S.C. § 77b(3)). This definition of "sale" and "sell" includes the terms "offer to sell" and "offer for sale" or every attempt thereof of any security or an attempt to dispose of a security for value. There would be no question that once a sale has been completed by offer and acceptance, and payment has been made, that the violation, if any, had been completed. Use of the mails thereafter simply provides the requisite Federal jurisdictional basis. In each instance, as recited above, the offer, acceptance, as well as payment, and thus the sale, to include the offer for sale of the security in question, was completed more than five years

prior to the date on which the indictment was found, and any prosecution on such Counts must necessarily be barred by the statute of limitations (Title 18, U.S.C. 3282).

In actions under Section 17(a) of the Securities Act, 15 U.S.C., § 77q(a), Professor Loss, at page 1521 of his text, "Securities Reg.", states:

> ". . . [T]he Government has always taken the position that the gist of the offense there is the fraud rather than the jurisdictional means."

The majority view, as established by a legion of cases, is that the use of the mails confers federal jurisdiction or in one case may be used to establish venue. See Schillner v. H. Vaughn Clarke & Co., 134 F.2d 875 (2d Cir. 1943); United States v. Cushin, 281 F.2d 669 (2d Cir. 1960); and United States v. Hughs, 195 F. Supp. 795 (S.D. N.Y. 1961). In the Cushin and Hughs cases, a distinction was made between fraud under the Securities Act and under the mail fraud statute, whereas in the former, the purpose of the mailing requirement is to confer federal jurisdiction, and in the latter the act of mailing is punishable.

The sending of a certificate evidencing ownership was in itself lawful, and, while conferring jurisdiction, is only incidental to the alleged crime. No offers, promises, or representations were made subsequent to the date payment was made. The sending of the certificate was at most entirely incidental

to the alleged scheme and not a part of it. See Getchell v. United States, 282 F.2d 681 (5th Cir. 1960). Delivery is not an element of the alleged crime, nor is it essential "to constitute punishable crime." See United States v. Schneiderman, 106 F. Supp. 892 (D.C. Cal. 1952). Surely, after an agreement is made to buy and sell and payment is made, the statute must begin to run, for it would be absurd to state that if delivery is never made the statute would be forever tolled.

In the security business, possession is not necessary for sale of stocks purchased. All brokers will sell, based upon a showing of a confirmation, which is evidence of purchase. Further, a sale of personal property is good between the parties without delivery. See Drescoll v. Drescoll, 143 Cal. 521, 77 Pac. 471 (1904); and Burkett v. Doty, 32 C.A. 337, 162 Pac. 1042 (1917).

The statute of limitations begins to run when the offense was complete. See Pendergast v. United States, 317 U.S. 412, 63 S. Ct. 268, 87 L.Ed. 368 (1942). The statute of limitations began to run when the Communist Party came into being in Yates v. United States, 354 U.S. 298, 77 S. Ct. 1064, 1 L.Ed.2d 356 (1957). In United States v. Schneiderman, 106 F. Supp. 892 (D.C. Cal. 1952), Judge Mathes stated:

> "Moreover, even though there may be a continuous agreement, as soon as an act is done 'to effect the object' of that agreement the crime of conspiracy is

complete and an indictment for that offense must be found 'within three years next after such offense shall have been committed' . . ." United States v. Schneiderman, 106 F. Supp. 892, 896 (D.C. Cal. 1952).

The object of a fraudulent sale is obviously to be paid, and when paid, the crime is complete. See also Kann v. United States, 323 U.S. 88, 65 S. Ct. 148, 89 L.Ed. 88 (1944), where it was said:

> ". . . the scheme was completely executed as respects the transactions in question when the defendants received the money intended to be obtained by their fraud, and the subsequent banking transactions between the banks concerned were merely incidental and collateral to the scheme and not a part of it." Kann v. United States, 323 U.S. 88, 95, 65 S. Ct. 148, 151, 89 L.Ed. 88, 96.

Statutes of limitation are clearly a substantive right which create a bar to prosecution and are to be liberally construed in favor of a defendant. See United States v. Gatz, 109 F. Supp. 94 (D.C. N.Y. 1952). The purpose of statutes of limitation in criminal cases is not only to bar prosecutions on aged and untrustworthy evidence, but it also serves to cut off prosecution for crimes a reasonable time after completion, when no further danger to society is contemplated from the criminal activity according to United States v. Bonanno, 177 F. Supp. 106 (D.C. N.Y. 1959) (rev. on other grounds, 285 F.2d 408 (2nd Cir. 1960)).

The Indictment herein was found on May 23, 1962. All mailings or other transactions, with the exception of the delivery of stock certificates after payment and sale, as alleged in

Paragraph 4, Count One, and in Counts Five and Six, occurred prior to May 23, 1957. Actions on such counts are clearly barred by 18 U.S.C. 3282.

Isolated cases have said that "the gist of the claims is the use of the mails. . . ." United States v. Guterma, 189 F. Supp. 265 (S.D. N.Y. 1960). However, even in the Guterma case, the court held that it was necessary that "the mails are used in execution" of the crime. The mere mailing of a stock certificate for delivery after a sale was completed is only incidental and not "in execution" of the crime. No evidence exists that the defendants sent or caused to be sent any false or misleading material to any of the investor witnesses through the mails, and under any interpretation Counts One, Three, and Five must fail.

It is respectfully submitted that Counts One, Three, and Five should have been dismissed.

POINT SIX

THE TRIAL COURT ERRED IN DENYING THE DEFENDANTS' MOTION TO STRIKE THE SURPLUSAGE APPEARING IN THE INDICTMENT AND THEREBY PREJUDICED THE DEFENDANTS.

The Six-Count Indictment returned against the defendants provided in Paragraphs 2 and 3 the following charge which included generic and indefinite references to acts of the defendants that were the subject of the defendants' motion to strike. The complained of portions of the respective paragraphs appear below, with emphasis supplied:

> "2. The defendants Howard P. Carroll and H. Carroll & Co., in order to deceive and mislead investors, and to induce them to purchase shares of the stock of Comstock, Ltd., made and caused to be made untrue, deceptive and misleading statements of material facts, including the following:
>
> "(a) That the stock of Comstock, Ltd. was being offered and sold at the market price.
>
> "(b) That Comstock, Ltd. operated a quicksilver mine in Cloverdale.
>
> "(c) That Comstock, Ltd.'s course was being chartered by shrewd, able Colonel T. R. Gillenwaters, an industrial counsel and attorney, who had a string of organizational triumphs to his record.
>
> "(d) That Country Club Charcoal Corporation was on the verge of fantastic profits; and other
>
> similar untrue, deceptive and misleading statements of material facts, all of which the defendants well knew to be false, fraudulent and misleading.

"3. The defendants Howard P. Carroll and H. Carroll & Co., in order to deceive and mislead investors, and to induce them to purchase shares of the stock of Comstock, Ltd., omitted to disclose to investors material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, including the following:

"(a) That there was no free and open market for the shares of Comstock, Ltd., and that the then existing price at which such stock was sold by H. Carroll & Co., was maintained, dominated and controlled by the defendants Howard P. Carroll and H. Carroll & Co.

"(b) That the major part of the shares of Comstock, Ltd. sold to investors by the defendants was obtained at 25 cents per share from a block of 500,000 shares of Comstock, Ltd., placed in a Denver, Colorado, escrow account.

"(c) That Country Club Charcoal Corporation had never made any profits and had not paid off debts incurred prior to its merger with Comstock, Ltd.

"(d) That the Cloverdale quicksilver mine had been shut down in November or December of 1956.

"(e) That Comstock, Ltd.'s course was not chartered by Colonel Gillenwaters.

"(f) That the projected profit per month for 1957-1958 for Comstock, Ltd. of $51,765.00 was an estimate for the future, having no valid or substantial basis in fact."

Rule 7(d), Federal Rules of Criminal Procedure, grants unto the court the right to strike surplusage from an indictment.

In United States v. Pope, 189 F. Supp. 12, 25, 26 (D.C. S.D. N.Y. 1960), the court made it clear that the words "among other things," as they appeared in the counts therein, "give the

defendants no further information with respect to them." The court goes further and states:

> "But the vice goes beyond mere failure to inform. The Grand Jury under the Constitution is the accusatory body in felony offenses. To permit the allegation to remain would constitute an impermissible delegation of authority to the prosecution to enlarge the charges contained in the indictment." United States v. Pope, 189 F. Supp. 12, 25, 26 (D.C. S.D. N.Y. 1960).

Therefore, it is respectfully submitted that the trial court erred and prejudiced the rights of the defendants by not striking the generic language complained of.

POINT SEVEN

THE TRIAL COURT ERRED IN ALLOWING RALPH FRANK TO TESTIFY, AFTER TIMELY OBJECTION, AS TO A TELEPHONE CALL WITH WARD DAWSON, WHICH WAS MADE OUT OF THE PRESENCE OF THE DEFENDANTS AND WAS NOT CONNECTED TO THE DEFENDANTS IN ANY WAY.

Ralph R. Frank, an attorney who had represented both H. Carroll & Co. and Howard P. Carroll, as well as Comstock, Ltd., was called as a prosecution witness (R. 672-698). As a part of Mr. Frank's testimony, the government elicited from him information allegedly acquired during the course of a telephone conversation with H. Ward Dawson, who once served as counsel for David Alison (R. 684). Admittedly, Mr. Frank was not familiar with the telephone voice of H. Ward Dawson (R. 684). The conversation was not in the presence of any of the defendants and was objected to on the basis of hearsay. The objection was overruled and deemed not to be within any privilege that might exist between H. Carroll & Co. or Howard P. Carroll and Ralph Frank, who had represented them.

The conversation in question related to the brown brochure and the attempts made by Mr. Frank to clear it with the California Corporation Commission (R. 684) and various other matters relating to H. Ward Dawson's thoughts and questions relating to Comstock, Ltd. and its operation. The obvious hearsay nature of such testimony hardly needs a citation or authority.

Hearsay evidence is a term applied to "that species of testimony given by a witness who relates, not what he knows personally, but what others have told him, or what he has heard said by others." Black's Law Dictionary, 3rd Ed., 1933. Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884). In short, it is second-hand evidence, as distinguished from original evidence. Thus, the testimony of Mr. Frank, as to what was said to him by H. Ward Dawson, out of the presence of the defendants, was obviously hearsay. The fact that the information came over a telephone conversation when Mr. Frank admitted that he did not know the voice of Mr. Dawson, adds to its inadmissibility. Hearsay evidence is the most untrustworthy of all types of evidence and should not be allowed to stand in supporting a conviction. Gaines v. Relf, 53 U.S. 472 (1851); The Hurricane, 2 F.2d 70, aff'd. C.C.A., 9 F.2d 396 (1925); McCormick, Evidence, § 225 (1954).

It is respectfully submitted that the admission of the testimony of Ralph Frank as to his conversation with H. Ward Dawson, out of the presence of the defendants, was error and prejudiced the rights of the defendants.

POINT EIGHT

THE COURT ERRED IN ADMITTING EXHIBIT 1 AFTER TIMELY OBJECTION WAS MADE.

Exhibit 1 was first considered when presented to Mr. Alison, the prosecution's initial witness. Mr. Alison testified that on or about January 1, 1957, certain documents were executed by him and others (R. 84). The documents referred to, according to Mr. Alison who recognized the signatures thereon, were signed by the various persons whose signatures appeared thereon (R. 87, 88). Apparently the documents consisted of promissory notes which were issued for the purpose of payment of the purchase price of a total of 500,000 shares of Comstock, Ltd. (R. 89). This is not absolutely clear from the testimony, but may be inferred from the testimony. The notes were given to Mr. Chevrier, who thereafter delivered the stock which was purchased thereby to Mr. Dawson (R. 156). The notes were never tied to either of the defendants in this case, were necessarily hearsay, and could not possibly have been material. Not only that, but thereafter an additional note, not offered in evidence, was substituted for the initial notes, which note was a personal note of Mr. Allison's (R. 156). Mr. Alison further testified that he had not paid on the note and that "I owe it all, I guess." (R. 157).

Exhibit 1 was not offered at the time that Mr. Alison testified as to matters relating to its execution. When Mr. Dawson was on the stand, he testified simply that the notes had been drawn by him (R. 390). Upon the offer of these notes at that time, objection was made as to materiality and as to Mr. Alison's statement that a new note was substituted in lieu thereof, and, also, that the notes would necessarily be hearsay as to the defendants. Notwithstanding these objections, the court admitted the exhibit in evidence (R. 391).

POINT NINE

THE TRIAL COURT DENIED THE DEFENDANTS A FAIR TRIAL BY CONSTANTLY AND CONTINUOUSLY INTERRUPTING THE WITNESSES TO PROPOUND THE COURT'S OWN QUESTIONS AND IN CONSTANTLY ASSISTING THE UNITED STATES ATTORNEY IN THE PRESENTATION OF THE PROSECUTION'S CASE.

Throughout the trial the court continually assisted the prosecution in this case by asking, both on direct and cross-examination, a substantial number of questions. The total number of questions which the trial court directed to the prosecution witnesses in this relatively short trial exceeded 450. In addition thereto, the court gave assistance to the prosecution to such an extent that the likelihood existed that the jury would determine that the court had passed the level of disinterest. Judge Hand, in United States v. Marzano, 149 F.2d 923 (2nd Cir. 1945), stated:

> ". . . Moreover, even if the jury were not as likely as seems to us to be the case, to have so understood what took place, the judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. Despite every allowance he must not take on the role of a partisan; he must not enter the list; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge. Adler v. United States, 5 Cir., 182 F. 464,472-474; Connley v. United States, 9 Cir., 46 F.2d 53, 55-56; Frantz v. United States, 6 Cir., 62 F.2d 737, 739; Williams v. United States, 9 Cir., 93 F.2d 685, 690, 691; United States v. Minuse, 2 Cir., 114 F.2d 36, 39." United States v. Marzano, 149 F.2d 923, 926 (2nd Cir. 1945).

The court in this case continued to not only assist the government, but to make reference to its participation. For example, the court, after propounding questions to the first government witness, instructed counsel for the government to take over (R. 92). Only minutes later, and to the same witness, the court stated:

> "Well, I am not supposed to try the case, counsel, but I'll ask him." (R. 100.)

At the commencement of the second day of trial, the court stated to the Assistant United States Attorney:

> "But I am forewarning you now that I am going to take over from now on if you don't get down to business." (R. 233.)

It is obvious that in the court's opinion the Assistant United States Attorney did not thereafter "get down to business" and the court did, in fact, "take over," as is evidenced not only by the questions propounded by the court, but also by the following statements of the court:

> "Now let me say this, counsel for the government, you see, it is really unfair for me to have to be constantly correcting the procedure on the part of the government, because it places the defendants' counsel in a rather difficult position. He probably doesn't want to be continually objecting." (R. 448.)

> "Counsel, let's move along today. Do not make it necessary for me to embarrass myself and you, too, on these questions. . . ." (R. 455.)

> "The proper way to do that is to ask him if it is his signature and start from there." (R. 526.)

"Even after I suggested it, and I shouldn't really do it, you don't offer it. It is admitted in evidence." (R. 527.)

"That is the saving question, counsel." (R. 557.) [This statement of the court was made after the court asked the witness a question on direct examination.]

"I really thought I had given up the practice of law, but I am beginning to believe that I am just starting over again." (R. 671.)

"I give you a little assistance, then you just quit entirely. You expect me to do the whole job. I am not supposed to try the case, counsel." (R. 707.)

"You ought to show that he at least knew that he had records, that they were kept, and lay the foundation. Let me do it." (R. 728.)

"I have practiced about all the law I am going to practice in this case from now on and, frankly, I believe I have almost anticipated [sic] [participated in] the trial of the case as a lawyer." (R. 786.)

"I didn't know I was trying the government's case. I was to an extent, I guess." (R. 854.)

And, finally, at the completion of the trial and after the jury had returned its guilty verdict, the court said:

"I want to forewarn the government, however, that I am not going to continue doing the practice of the law that I have done in this case." (R. 1024.)

In Williams v. United States, 93 F.2d 685 (9th Cir. 1937), consideration was given to circumstances not dissimilar to this case. The Court stated:

"Our own examination of the record has convinced us that by far the major portion of the 200-page examination conducted by the District Judge--when such examination dealt with more than formal or preliminary matters--tended to aid the prosecution in proving its material contentions.

> Rare indeed were the instances in which the trial court came to the rescue of the defense. The court's insistent efforts to connect the appellants with the books and literature of the Hollywood Dry Corporation; its frequent and unnecessary interruptions of both direct and cross-examinations that were being competently conducted; and its lengthy and inquisitorial cross-examination of the defendants, including the appellants themselves, all tended, we think, to convey to the jury--though no doubt inadvertently--the impression that the court was insisting upon a conviction.
>
> "The prejudicial effect of protracted questioning of witnesses by the trial judge, and the handicaps under which counsel labor in coping with such a situation, have been repeatedly emphasized in the decisions." Williams v. United States, 93 F.2d 685, 690 (9th Cir. 1937).

The Supreme Court of the United States, in considering participation of the trial judge in the trial itself as it relates to a fair trial by standard and appropriate procedure, stated in Bollenbach v. United States, 326 U.S. 607, 66 S. Ct. 402, 90 L.Ed. 350 (1946):

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out by the evidence, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.
>
> "Accordingly, we cannot treat the manifest misdirection of the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must therefore be disregarded. 40 Stat. 1181, 28 U.S.C. § 391, 28 U.S.C.A. § 391." Bollenbach v. United States, 66 S. Ct. 402, 406.

Additionally, in United States v. Fry, 304 F.2d 296 (7th Cir. 1962), which reviewed the participation by the trial judge

in the trial of the case and cited Bollenbach v. United States, supra, the court stated:

> ". . . It is sufficient to point out that the record shows that in the course of a six and one-half days' trial the court asked a total of 1,210 questions of the witnesses both during direct and cross-examination. . . .
>
> "After an examination of the entire record of the trial, we are forced to the conclusion that the cumulative effect of the trial judge's constant and extensive questions of the witnesses and his occasional remarks was to destroy the required atmosphere of impartiality.
>
> "Whether the evidence offered by the government of defendant's guilt indicates that he is guilty as charged is irrelevant to the separate issue whether he received a fair trial. United States v. Salazar, 2 Cir., 293 F.2d 442; Cf. Bollenbach v. United States, 326 U.S. 607, 66 S. Ct. 402, 90 L.Ed. 350." United States v. Fry, 304 F.2d 296, 298 (7th Cir. 1962).

See also Gomila v. United States, 146 F.2d 372 (5th Cir. 1944), where the court stated:

> ". . . We have had occasion heretofore to comment upon the conduct of the trial judge in taking over and examining witnesses under examination by respective counsel, and his comments in the presence and hearing of the jury. In Adler v. United States, 5 Cir., 182 F. 464, 472, we said: . . .
>
> "'A cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice the defendant when it is conducted by the trial judge. Besides, the defendant's counsel is placed at a disadvantage, as they might hesitate to make objections and reserve exceptions to the judge's examination, because, if they make objections, unlike the effect of their objections to questions by opposing counsel, it will appear to the jury that there is direct conflict between them and the court.'

"In Hunter v. United States, 5 Cir., 62 F.2d 217, 200, we again said:

"'The assignments of error based on the district judge's cross-examination of appellant are in our opinion well taken. While that method of cross-examination, if it had been conducted by the district attorney, might have been proper, a district judge ought never to assume the role of a prosecuting attorney and lend the weight of his great influence to the side of the government. It is the judge's duty to maintain an attitude of unswerving impartiality between the government and the accused, and he ought never in any questions he asks go beyond the point of seeing to it, in the interests of justice, that the case is fairly tried. We refer with entire approval to what Judge Shelby, speaking for this court long ago, said on this subject in Adler v. United States, 5 Cir., 182 F. 464. . . . It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted. It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time appear to the layman on the jury to be impartial. . . .'

"In Williams v. United States, 9 Cir., 93 F.2d 685, the Ninth Circuit Court, as set forth in the syllabus, held:

"'The harm done when the trial judge departs from that attitude of disinterestedness which is the foundation of a fair and impartial trial is not diminished because the judge so acts by reason of unrestrained zeal or through inadvertence and is not intentionally unfair.'" Gomila v. United States, 146 F.2d 372, 374 (5th Cir. 1944).

Even with the court's participation in the trial, the evidence and testimony were in such a state that the able and experienced court was unable to follow the proceedings and was in a state of confusion, as is shown by statements of the court which follow:

"Counsel, I am going to admit the thing. Leave it stand admitted and leave it to the jury to decide. I must say this is certainly confusion." (R. 775.)

"I am beginning to get a little confused myself." (R. 778.)

"The way the evidence has gone in in this case it is almost impossible for the court to correlate the evidence." (R. 813.)

"It is more than that, but the problem is that it has been drawn in in such a piecemeal way and in such a confused way that it may be that the jury will have some problems with it." (R. 813.)

"The way this case has gone in, it is a real problem." (R. 818.)

"The way this case came in in its hacksaw fashion I wouldn't be surprised if you haven't forgotten some of it yourself, counsel." (R. 820.)

". . . [T]he evidence goes in in such a fashion that, frankly, even the court is confused." (R. 823.)

An example of the nature of the confusion which must have existed in the minds of the jury as it admittedly existed in the mind of the court relates to payment to a printer for the printing of a report for the stockholders of Comstock, Ltd. (R. 519). Repeated efforts were made by the Assistant United States Attorney to establish that such payment was made by the defendants. This effort was without success. The only evidence relating to any payment was that Kenneth Raetz, who was a public relations man, was employed to perform certain services for the defendant company of the type described in Exhibit 4 (R. 522-524) and that he was paid a certain sum as an advance against such services (R. 522, 541). No testimony

exists that this payment was made for the purpose of paying the printing bill. However, due to the "hacksaw fashion" in which the evidence was presented, the court mistakenly concluded that the payment was made by the defendants in stating:

> "If Carroll paid for the printing of these exhibits, the same as Exhibit 3, what difference does it make how much he paid?" (R. 536.)

Again, the court was mistaken in stating:

> "I ask you - you have already proved that he paid for the merchandise, that he got money from the Defendant. What else do you want?" (R. 548.)

It is respectfully submitted that the trial judge committed error by participating in the trial and by evidencing his belief in the guilt of the defendants by assisting the prosecution in the presentation of the case on trial.

POINT TEN

THE TRIAL COURT PREJUDICED THE RIGHTS OF THE DEFENDANTS AND DENIED THE DEFENDANTS A FAIR TRIAL BY REQUIRING DEFENSE COUNSEL TO MAKE LEGAL ARGUMENTS ON THE ADMISSIBILITY OF EVIDENCE IN THE PRESENCE OF THE JURY.

From the very inception, the court presumed an ability in the jury to separate from its mind, and in the consideration of the case, nonevidentiary matters from evidence. Impressions of the Assistant United States Attorney, as well as hypothetical problems having no bearing on the case, were discussed in the presence of the jury. Early in the trial, the Assistant United States Attorney requested a right to approach the bench to discuss such a matter, which request was denied (R. 83). Thereafter, the court did recognize that certain statements in the presence of the jury could be prejudicial to the defendants in warning a witness out of the presence of the jury (R. 120). This recognition ceased when the court later expressed its opinion on the question of the legality of making or maintaining a market in securities. Without the opportunity for legal argument on the matter and in the presence of the jury, this opinion of the court was persisted in, over objection, terminating in the court remarking:

> "I don't think so, counsel, you and I disagree and since I have the last word I will stand on it." (R. 343)

Again the court, in the presence of the jury, in attempting to explain an extremely technical aspect of securities markets, assumed the sale of "worthless" stock, and also assumed " . . . matching the sales to maintain a price . . ." with the conclusion that such would be "an illicit transaction" (R. 345). Such a matter would without doubt involve at least "an illicit transaction"; however, this matter was not before the court and the jury, nor was any allegation of matched sales made or proved, nor was any allegation that the stock of Comstock, Ltd. was "worthless" made or proved. The court admitted that:

> "Now we haven't gotten to that state in this case and we may not get there." (R. 345)

The case did not "get there." There can be no doubt that statements such as these in the presence of the jury, no matter what subsequent instructions might be given, severely prejudiced the rights of the defendants to a fair trial, as well as made it clear to the jury that the court was taking sides in the case.

The Assistant United States Attorney on another occasion requested a right to approach the bench (R. 432). Upon denial of this right, the court was advised that the original of a certain document (Exhibit 52) was in the Superior Court files of the State of California (R. 433). The discussion continued, to the prejudice of the defendants, in which it was disclosed that the witness had apparently sued the defendant company, which

fact, when pointed out to the court, caused the court to state:

> "I didn't say he had sued. You are the one that said that." (R. 434)

Even with the attitude of the court clear as it related to discussions out of the presence of the jury, counsel for the defendants, while reluctant to do so, on two additional occasions, objected to discussions in the presence of the jury (R. 471, 623). Both objections were overruled, and discussions prejudicial to the rights of the defendants continued. In the case of United States v. Powell, 171 F. Supp. 202, (DC. Cal. 1959), the court stated:

> " * * * * Courts, particularly in criminal cases, are zealous in protecting the rights of a defendant against the possibility of the jury being influenced by nonevidentiary matters." United States v. Powell, 171 F. Supp. 202, 205, (D.C. Cal. 1959).

Also, the California District Court of Appeal stated in People of the State of California v. Doyle Terry, 4 Cal. Rptr. 597 (1960):

> " * * * * Ordinarily, the better practice requires that all doubtful questions of evidence or procedure should not be proposed or discussed in presence of the jury (88 C.J.S. Trial § 84), ..." People v. Terry, 4 Cal. Rptr. 597, 600 (Cal. App., 1960)

Also see Eierman v. United States, 46 F.2d 46 (10th Cir., 1930) where the court stated:

> "It is our conclusion that the better practice is to hear evidence bearing upon the admissibility of other evidence, out of the presence of the jury, unless such preliminary evidence likewise goes to the weight of the

evidence proffered, or unless the preliminary evidence is clearly of a nonprejudicial character. Whether failure to adopt this practice is reversible error depends upon whether it appears that the preliminary evidence did not prejudice the rights of the defendant in the particular case. Considering the extent and nature of the preliminary evidence in the case at bar, we cannot say affirmatively that it was not prejudicial. 'And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmative appears that they were harmless.' Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 82, 39 S. Ct. 435, 437, 63 L. Ed. 853. The peculiar circumstance that hearsay evidence was offered before the question of admissibility arose and after it had been determined, leaves a suspicion that this unwarranted practice was indulged in because it was prejudicial, a practice that cannot be sanctioned." Eierman v. United States, 46 F.2d 46, 49 (10th Cir., 1930).

The effect of continued and repeated discussions of matters which could not properly be testified to or placed in evidence, it is urged, were prejudicial and had the effect of denying the defendants a fair trial.

POINT ELEVEN

THE TRIAL COURT ERRED IN ELECTING NOT TO GIVE INSTRUCTIONS THAT WERE FAVORABLE TO THE DEFENDANTS, BECAUSE DEFENSE COUNSEL, IN COMPLIANCE WITH RULE 30, FEDERAL RULES OF CRIMINAL PROCEDURE, REQUESTED THAT THEY BE INFORMED OF THE INSTRUCTIONS WHICH THE COURT WOULD GIVE OR THE ACTION WHICH THE COURT WOULD TAKE ON THE INSTRUCTIONS TENDERED BY THE PROSECUTION AND THE DEFENSE.

The following colloquy gives rise to Point Eleven:

"THE COURT: Counsel for the defense, the reason I didn't bring the jury back, I want to be sure that we understand each other on Rule 30. I realize that Rule 30 says that the Court shall inform counsel of the instructions it proposes to give. I never insisted on the court doing it because I felt I was fully capable of pointing out the errors in the instructions. If you feel in any way that will work to your prejudice by not indicating the instructions I'm going to give, I'll indicate them to you in a general way.

"MR. ERICKSON: I think that would be very helpful.

"THE COURT: Do you think it will work any prejudice in any way?

"MR. ERICKSON: It would, your Honor.

"THE COURT: Then I will cut some of the instructions I am going to give for you. They were very favorable. Those go out. So I'll tell you now what I'm going to give.

"MR. ERICKSON: Just a moment.

"THE COURT: I'm going to give them to you.

"MR. ERICKSON: We will withdraw our objection.

"THE COURT: No, I'm going to give them now. The issue has been made. Here are the instructions I am going to give. . . ." (R. 904-905.)

Again, authority hardly seems necessary to oppose such action by the trial court. The court's duty is to instruct on the law of the case, and the right provided by Rule 30, Federal Rules of Criminal Procedure, should be observed. United States v. Crescent Kelvan Co., 164 F.2d 582 (3rd Cir. 1948). The obvious purpose of the rule is to enable lawyers to make an argument to the jury that will not usurp the court's function and go beyond the instructions that the court intends to give. Ross v. United States, 180 F.2d 160 (6th Cir. 1950). It is impossible to guess what the instructions were or what instructions the court would have given had not Rule 30, Federal Rules of Criminal Procedure, been looked to for the purpose of making a logical and fair argument.

It is respectfully submitted that the trial court's action shows a state of mind that is abhorrent to our system of jurisprudence and reflects his bent of mind which denied the defendants a fair trial.

POINT TWELVE

THE JURY'S VERDICT IS NOT SUPPORTED BY SUBSTANTIAL OR COMPETENT EVIDENCE WHICH WOULD ESTABLISH THE DEFENDANTS' GUILT BEYOND A REASONABLE DOUBT, AND THE DEFENDANTS WERE ENTITLED TO A JUDGMENT OF ACQUITTAL AS A MATTER OF LAW.

A motion for judgment of acquittal was made at the close of the prosecution's case (R. 786). Thereafter, a motion to strike was made, relating to the exhibits and testimony which have heretofore been the subject of the evidentiary arguments in this brief, which was denied (R. 826-830). The motion for a judgment of acquittal was also renewed after defense counsel had reviewed the evidence and had elected to rest without putting on a defense, other than that which appeared during the presentation of the prosecution's case in chief (R. 850).

When the motions for a judgment of acquittal were made, the court took both motions under advisement and allowed the matter to be submitted to the jury. The motion was renewed after a verdict of guilty was returned (R. 1021-1022).

Thereafter, the court set December 3, 1962, for a determination of the merits of the defendants' motions for judgment of acquittal and for sentencing in the event a judgment of acquittal should be denied (R. 1023). On December 3, 1962, after reviewing the brief filed by the defendants, the court continued the matter to December 17, 1962, for a ruling on the motion for judgment of

acquittal or for sentencing if the motion was denied. Before sentence was imposed on December 17, 1962, the court had before it the brief and reply brief of the defendants and the prosecution's brief wherein the government admitted that it was error to admit Exhibit 22.

The record supporting the indictment is devoid of evidence which would support a conviction, and an acquittal should follow as a matter of law. Rule 29, Federal Rules of Criminal Procedure grants unto the defendants the right to move for the entry of a judgment of acquittal as to the offenses charged in the indictment when the evidence is insufficient in quantity or quality to sustain a conviction of the offense or offenses charged. This Court, in a proper case, may also enter a judgment of acquittal when the quantity or quality of the evidence fails to sustain proof beyond a reasonable doubt. Karn v. United States, 158 F.2d 568 (9th Cir. 1946). Woodard Laboratories v. United States, 198 F.2d 955 (9th Cir. 1952); Venus v. United States, 287 F.2d 304 (9th Cir. 1960) where a conviction was upheld and reversal and dismissal was ordered by the Supreme Court. 368 U.S. 345, 82' S. Ct. 98, 7 L. Ed. 2d 341 (1961). If the evidence is totally lacking and no competent or substantial evidence exists to sustain the verdict, the judgment must necessarily be granted either in the trial court or in the Court of Appeals. Karn v. United States, supra; DeJonge v. Oregon, 299 U.S. 353, 57 S. Ct.

255, 81 L. Ed. 278 (1936). See also, Thompson v. Louisville, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed.2d 654, 80 A.L.R.2d 1355 (1960), where a conviction without evidence was held to be a denial of due process.

Where a conviction is based upon circumstantial evidence, the circumstance proven must be such as will directly support an inference of the fact to be established. All reasonable doubt as to the innocence of the accused must be overcome by established facts. Calvaresi v. United States, 216 F.2d 891 (10th Cir. 1954); United States v. Baker, 50 F.2d 122 (2nd Cir. 1931); Brady v. United States, 24 F.2d 399 (8th Cir. 1928).

In determining whether or not the record will support a conviction, the Court should consider the pronouncement in Calvaresi v. United States, 216 F.2d 891 (10th Cir. 1954), where the Court of Appeals, in reviewing a conviction of all defendants of the crime of jury tampering, said, in directing an acquittal of Michael J. Benallo:

> "Whenever a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is favorable to innocence, such circumstance is robbed of all probative value and is insufficient to support a judgment of acquittal." Calvaresi v. United States, 216 F.2d 891, 905.

Calvaresi v. United States, 348 U.S. 961, 75 S. Ct. 522, 99 L. Ed. 749 (1955), where the Supreme Court reversed the conviction of all defendants on counsel's petition for certiorari.

Of the same tenor is Judge Hutcheson's opinion in Kassin v. United States, 87 F.2d 183, 184 (5th Cir. 1936), where he reversed a conviction and stated the rule to be:

> "Circumstantial evidence can indeed forge a chain and draw it so tightly around an accused as almost to compel the inference of guilt as a matter of law. Again, circumstantial evidence may forge the chain and draw it tight by legally justifiable, rather than absolutely compelling, inferences. In each case, however, where the evidence is truly circumstantial, the links in the chain must be clearly proven and taken together must point not to the possibility or probability, but to the moral certainty of guilt. That is, the inferences which may reasonably be drawn from them as a whole must not only be consistent with guilt, but inconsistent with every reasonable hypotheses of innocence." Kassin v. United States, 87 F.2d 183, 184 (5th Cir. 1936).

In Union Pacific Coal Co. v. United States, 173 Fed. 737, 740 (8th Cir. 1909), Judge Sanborn, in a landmark decision said:

> "There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypotheses but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse the judgment of conviction." Union Pacific Coal Co. v. United States, 173 Fed. 737, 740 (8th Cir. 1909).

Justice Bone, in Karn v. United States, supra, directed that an acquittal enter for lack of evidence in a larceny prosecution, when the evidence before the court on appeal did not point so surely and unerringly to the guilt of the accused as to exclude

every reasonable hypothesis but that of guilt, and said, after analyzing the circumstantial evidence which supported the conviction:

> "In our examination of this record, we have recognized the rule announced in Banks v. United States, 9 Cir., 147 F.2d 628 that if there be some competent and substantial evidence to sustain the verdict, we must affirm. We have carefully examined this record and we find no evidence of this character.
>
> "Viewing the evidence most favorable to the government, we gather from the record the following facts:
>
> "The prosecution relied entirely upon circumstantial evidence for a conviction. It is sufficient to say that under such circumstances the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. The evidence should be required to point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis but that of guilt. 23 C.J.S. Criminal Law, § 907, pp. 151, 152; Paddock v. United States, 9 Cir., 1935, 79 F.2d 872, 876; Ferris v. United States, 9 Cir., 1930, 40 F.2d 837, 840. Our considered judgment is that the evidence in this case falls far short of meeting this exacting standard." Karn v. United States, 158 F.2d 568, 569 (9th Cir. 1946).

The test was again reiterated in Woodard Laboratories v. United States, 198 F.2d 995 (9th Cir. 1952), after the defendants were convicted of a violation of the Federal Food, Drug and Cosmetic Act and contended on appeal that the evidence was insufficient to support a conviction. In analyzing the evidence and sustaining the conviction, the court said:

> "The usual rule to be followed in determining the sufficiency of evidence to sustain a judgment is well settled. 'It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a

jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.' Glasser v. United States, 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680. See Banks v. United States, 9 Cir., 1945, 147 F.2d 628. However, the appellant strongly urges that the Government's case is founded upon circumstantial evidence, and that therefore the proper test of whether the evidence is sufficient to sustain the judgment depends upon whether all of the substantial evidence is as consistent with a reasonable hypothesis of innocence as with guilt; if it is, the judgment must be reversed. Karn v. United States, 9 Cir., 1946, 158 F.2d 568; McCoy v. United States, 9 Cir., 1948, 169 F.2d 776. * * * Substantial evidence is '* * * such relevant evidence as a reasonable mind might accept as adequate to support a conclusion * * *.' N. L. R. B. v. Columbian Co., 1939, 306 U.S. 292, 300, 59 S. Ct. 501, 505, 83 L. Ed. 660. The testimony of witnesses Carol and Banes was substantial and cannot be said to have been as consistent with a reasonable hypothesis of innocence as with guilt." Woodard Laboratories v. United States, 198 F.2d 995, 998.

Of like effect was the decision in United States v. Riggs, 280 F.2d 949 (5th Cir. 1960), where the court said, in analyzing a thirteen-count indictment charging conspiracy and a violation of the Revenue Laws:

> "On a motion for judgment of acquittal the test is whether, taking the view most favorable to the Government, a reasonably minded jury might accept the relevant evidence as adequate to support a conclusion of the defendant's guilt beyond a reasonable doubt." United States v. Riggs, 280 F.2d 949 (5th Cir. 1960).

A conviction that is not supported by substantial evidence is the same as a conviction on a charge not made and should not be allowed to stand. Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L. Ed. 2d 659 (1960); DeJonge v. Oregon, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 279 (1936).

In reviewing the record, this Court must determine whether or not the United States had established by substantial and competent evidence that the defendants were guilty beyond a reasonable doubt as to every count in the indictment. Necessarily, the evidence must be reviewed to determine what evidence is competent and what evidence is substantial enough to point to the defendants' guilt beyond a reasonable doubt. The government's case hinges on Exhibit 22, which was a letter from Fleischell, an attorney practicing in San Francisco, to Marvin Greene,who at that time was an employee of the Securities and Exchange Commission (R. 465, 739-888). This letter set forth the numbers of certain stock certificates, the number of shares represented thereby, as well as the name of the record owner thereof, which certificates were purportedly delivered to the Security Transfer Corporation at the instance and request of a person or persons unknown. Circumstantially, it may be inferred from the record that David Alison created the escrow account at the Security Transfer Corporation. Neither of the defendants were named in the exhibit, and Exhibit 22 served as a keystone for the admission of other exhibits. Thus, without foundation the exhibit must necessarily fall. The case of the United States must fail if the evidence complained of was essential to establish guilt. See Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958);

Standard Oil of California v. Moore, 251 F.2d 188 (9th Cir. 1957); N.R.L.B. v. Sharpless, 209 F.2d 645 (6th Cir. 1954). Accord, Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L. Ed. 645 (1943).

To establish a prima facie case, the Government must by competent evidence establish that there was a scheme or artifice to defraud that was used to obtain money or property by the use of untrue statements of material facts or by the omission to state material facts which were necessary to make the statements made not misleading. The evidence of scheme relied upon by the United States Attorney to establish his case springs from H. Carroll & Co.'s actual purchase of approximately 300,000 shares of the common stock of Comstock, Ltd. from the Securities Transfer Corporation at twenty-five cents per share, during a period when shares were also purchased through the facilities of the San Francisco Mining Exchange (R. 715). Even if an escrow was established and the sale of securities did occur, a scheme to defraud was not established.

Howard P. Carroll himself made no misstatements of fact, and the scheme, as well as the false representations which would be chargeable against Carroll, must lie in things done and words uttered by others at the instance and request of Carroll. United States v. Kemble, 198 F.2d 889 (3rd Cir. 1952); United States v. Food and Grocery Bureau of Southern California, 43 F. Supp. 966

(S.D. Cal. 1942). No salesman suggested that Carroll had authorized any representation of a material fact which would be false in nature, and Carroll's good faith in training salesmen would not be such as to cause him to answer for their criminal acts. Any evidence which supports the Government's charge consists of leading questions with their parrot-like answers. It is difficult to truly evaluate the evidence, but the fact remains that the conviction of Howard P. Carroll on the Six Counts charged in the Indictment must rest upon inference, with inference piled upon inference, to reach the prosecution's desired end.

In measuring the criminal responsibility of a corporate president for the acts of its salesmen, the court must consider the tests which have been laid down to establish guilt in a criminal case. United States v. Kemble, 198 F.2d 889 (3rd Cir. 1952), involved prosecution of a labor union and its business agent for committing acts of violence and various other acts which constituted extortion and obstruction of commerce. There the court held that the evidence was insufficient to show that the defendant local union actively participated in or authorized or ratified acts of the business agent, and, therefore, conviction of the union was unjustified. The decision principally rested upon the court's acceptance of the idea that a principal or master cannot be held criminally for acts of his agent contrary to his orders, and without authority, express or implied,

merely because such acts are within the course of its business and within the scope of the agent's employment. Civil liability, in the opinion of the court, could have rested upon the same circumstances, but the court held that the principles of civil liability cannot be extended to a criminal prosecution. The doctrine of respondeat superior is a tort doctrine and finds no application in the criminal law. The statements of salesmen to the investor witnesses will not support a conviction unless the statements were made with the knowledge or at the direction of Howard P. Carroll, and no evidence appears in the record to sustain such a conclusion.

Sufficient evidence did not appear to show a concert of action between Howard P. Carroll and the corporation to bring about a conviction of any of the counts charged in the Indictment. In the leading case of Fuentes v. United States, 283 F. 2d 537 (9th Cir. 1960), this Court speaking through Justice Jertberg, defined the concept of concert of action and the limitationswhich must be placed upon testimony of witnesses who testify as to acts of agents committed out of the presence of the principal. In the principal case, Fuentes and a co-defendant, Torres, were tried jointly and were convicted on an indictment which charged violation of the narcotics law. On appeal the question was raised as to the propriety of the admission of

statements and alleged admissions which were made by the co-defendant, Torres, out of the presence of Fuentes, on the basis of the hearsay rule. In analyzing the defendant's contention in the light of the applicable law, the court held that the evidence, by way of extra-judicial statement and admission, even though outside of the presence of the defendants, was admissible, since there was sufficient independent evidence of concert of action between the defendants, and said:

> "In the instant case the statements and admissions of Torres were not received against the appellant until there was first received ample evidence, apart from the admissions and statements of Torres, from which the jury might reasonably infer the existence of a conspiracy or concert of action on the part of appellant and Torres, to violate the Federal Narcotics Law. This independent evidence in part consisted of (1) the fact that appellant was physically present at the scene of each transaction alleged in counts 1 to 5 inclusive; (2) there was contact between Torres and the appellant in each transaction between the receipt of the purchase price by Torres from the Treasury Agent and the time Torres made actual delivery of the heroin to the Treasury Agent; (3) in each transaction there was testimony by the Treasury Agent that something was seen to pass between Torres and the appellant; and (4) there were oral admissions made by the appellant to the Treasury Agent that he acquired the heroin from sources in Mexico and San Diego." Fuentes v. United States, 283 F.2d 537, 540 (9th Cir. 1960).

In addition to stating the doctrine of agency and clarifying the meaning of "concert of action," this Court introduced the concept of "combination." In so doing, it quotes from the case of Hitchman Coal and Coke Company v. Mitchell, 245 U.S. 229, 38 S. Ct. 65, 62 L. Ed. 260 (1917), as follows:

"'In order that the declaration and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves.'" Hitchman Coal and Coke Company v. Mitchell, 245 U.S. 229, 239, 38 S. Ct. 65, 72, 62 L. Ed. 260, 268 (1917). See also, Morei v. United States, 127 F.2d 827 (6th Cir. 1942).

A review of the record discloses that Howard P. Carroll was not present at the time any of the alleged misrepresentations were made, and the testimony of the investor witnesses was such that it becomes clear that there was no uniformity in the statements made to them by the various salesmen working for H. Carroll & Co. Howard P. Carroll was not tied into any representation made by any salesmen.

In reviewing the evidence, it becomes clear that Howard P. Carroll did not act in concert with H. Carroll & Co., or with any of its agents, to perpetrate any scheme to defraud upon any investor. The case most in point is Getchell v. United States, 282 F.2d 681 (5th Cir. 1960), where the defendants were charged with both mail fraud violations and fraud in the sale of securities. A conviction was returned against all defendants, even though the evidence was fragmentary against some of the defendants, and on appeal the conviction was reversed. In reviewing the evidence, we must determine whether it is sufficient to

establish evidence of a manipulation or rigging case. Such a charge is not supported by the testimony or by the exhibits produced.

In determining whether or not market rigging or manipulation occurred, it is necessary to view the records of the San Francisco Mining Exchange, which show that the price of Comstock, Ltd. stock fluctuated from twenty-five cents per share to a high of thirty-six cents per share, and then held the price of twenty-five cents per share for some two months after the period expired that is complained of in the Indictment (Exhibits 32, 33, 34 and 79) (Quotation sheets of the San Francisco Mining Exchange for the months in issue).

The Indictment alleges that Howard P. Carroll and H. Carroll & Co. devised a scheme whereby sales of the stock of Comstock, Ltd. were induced by the use of untrue, deceptive, and misleading statements of material facts. The false statements charged both to H. Carroll & Co. and to Howard P. Carroll as an individual were set out with particularity in Paragraph 2 of the Indictment and consisted of the following:

> "2. The defendants Howard P. Carroll and H. Carroll & Co., in order to deceive and mislead investors, and to induce them to purchase shares of the stock of Comstock, Ltd., made and caused to be made untrue, deceptive and misleading statements of material facts, including the following:
>
> "(a) That the stock of Comstock, Ltd. was being offered and sold at the market price.

"(b) That Comstock, Ltd. operated a quicksilver mine in Cloverdale.

"(c) That Comstock, Ltd.'s course was being chartered by shrewd, able Colonel T. R. Gillenwaters, an industrial counsel and attorney, who had a string of organizational triumphs to his record.

"(d) That Country Club Charcoal Corporation was on the verge of fantastic profits; and other similar untrue, deceptive and misleading statements of material facts, all of which the defendants well knew to be false, fraudulent and misleading."

It is clear from an analysis of the record, in the light of the misrepresentations charged, that only one witness suggested that the representation had been made that Comstock, Ltd. was being offered and sold at the market price. All investor witnesses testified that they bought the stock as principals, and many admitted that they bought it as a speculation. No fact was misrepresented if the statement was made that the stock was being offered and sold at the market price, inasmuch as the price was obtained from the San Francisco Mining Exchange.

All alleged false statements which may have been made to investors, including those named in Counts 1 to 3, which go beyond the specific alleged false statements in Paragraph 2, subparagraphs (a), (b), (c), and (d) of Count 1, may be shown only for the purpose of establishing a scheme. The specific false statements (b) "That Comstock, Ltd. operated a quicksilver mine in Cloverdale," and (c) "that Comstock, Ltd.'s course was being

chartered by shrewd, able Colonel T. R. Gillenwaters, an industrial counsel and attorney, who had a string of organizational triumphs to his record," were admitted to have been true by the Government as a result of the failure of proof relating to the operation or nonoperation of the mine and the testimony of Colonel Gillenwaters which establishes the accuracy of the statement relating to him. The alleged false statement, subparagraph (d) of Paragraph 2 of Count 1, "that Country Club Charcoal Corporation was on the verge of fantastic profits," which was taken out of context, must be considered in the light of the complete statement appearing on page 8 of the Charcoal Brochure, Exhibits 57 and 85. The complete statement is as follows:

> "Even though Country Club Charcoal was on the verge of fantastic profits, it took more money than Alison had to enter the charmed circle."

Again, no testimony was presented that Country Club Charcoal was not, prior to the sale of the assets to Comstock, Ltd., on the verge of fantastic profits, if, according to the statement, additional moneys had been available to Alison. Therefore, even considering all evidence in the light most favorable to the Government, three out of the four alleged misrepresentations must immediately fall as not having been proved in any respect.

Subparagraph (a) of Paragraph 2 of Count 1 alleges misrepresentations in the statement "that the stock of Comstock, Ltd. was being offered and sold at the market price." Only one witness,

Count 3, investor Wyatt, stated that he was told that he was purchasing the stock at the market. The only evidence presented was that all such shares were in fact being sold at the "market." The inference of manipulation, due to the fact that H. Carroll & Co. was purchasing shares of stock of Comstock, Ltd. from a San Francisco Mining Exchange member house and at the same time was purchasing identical shares from a deposit account with the Securities Transfer Corporation in Denver, was present, but was not alleged. Thus, on the face of the Indictment and from a review of the evidence, the question presented, but not affirmatively alleged, is not were the sales at the market, but was that market a free and open market or a manipulated market? That there was a free and independent market, not controlled or dominated by H. Carroll & Co., is apparent from Government's Exhibits 32, 33, 34, 79 (the quotation sheets of the San Francisco Mining Exchange) and 104 (the records of Chevrier & Co.). These exhibits clearly established that during the time that shares were sold, including the time such shares were sold to investor Wyatt, H. Carroll & Co. was effecting very few transactions through purchases from the exchange member. For the fifteen-day period April 23 - May 6, 1957, a total of 6,500 shares of common stock of Comstock, Ltd. were sold through the facilities of the Exchange. Of this amount, only 1,000 shares were purchased by H.

Carroll & Co., and these at a price of twenty-six cents per share. Also, for the period commencing May 14, 1957 to July 22, 1957, a period of approximately seventy (70) days, H. Carroll & Co. purchased a total of 3,000 shares, through the facilities of the Exchange, out of a total of 20,000 shares purchased on the Exchange. This, as a matter of law, would establish that H. Carroll & Co. was not dominating and controlling the market on the Exchange, and that shares which he purchased from the exchange member were at a price established through transactions by other purchasers. The testimony before the trial court was that the market price, as established for the resale of shares of stock purchased by H. Carroll & Co., was that which was given to H. Carroll & Co. traders from the member firm. Those principal sales were made to customers at the "market." H. Carroll & Co. had no obligation to disclose cost of purchases by it of such shares at a lower price, unless such shares were sold to customers as their agent. In any event, the price differential between the cost of shares purchased from the deposit account and the price at which such shares were sold to customers from twenty-five cents to thirty-six cents per share was approximately the normal and customary commission involved on such low price stocks with small volume of trading. As a matter of law, there was no evidence that the stock sold was not sold at "the market

price." Only a scintilla of evidence exists that the market may not in fact have been realistic. This evidence is overwhelmingly rebutted by a review of the actual transactions on the Exchange itself. Also to be borne in mind is the fact that in addition to the 500,000 shares on deposit with the Security Transfer Corporation and the 1,500,000 shares issued, or to be issued, for the acquisition of the assets of Country Club Charcoal Corporation, an additional 500,000 shares of stock were outstanding and could be traded without restriction. The total volume of purchases over the Exchange, in relation to the total number of tradable shares outstanding, is such as to make a manipulation impossible.

As the Court knows, the classic manipulation requires control over all, or substantially all, of the outstanding shares, so that purchases will in fact cause the market to rise. A review of Exhibit 104 (records of Chevrier & Co.), as well as Exhibits 32, 33, 34, and 79 (records of the San Francisco Mining Exchange), adequately establishes that as often as not purchases on the Exchange caused the market price to decrease as to increase.

The fraud provisions of the Securities Act only require additional statements to be made in the event certain statements which have been made will be misleading in the light of the circumstances under which they are made, unless the additional

statements are made. Even if this were not the case, the alleged failure to state material facts, as set forth in Count 1, Paragraph 3, subparagraphs (a) through (f), were not established by the evidence. As with the alleged positive misstatements, subparagraphs (d) "that the Cloverdale quicksilver mine had been shut down in November or December of 1956," and (e) "that Comstock, Ltd.'s course was not chartered by Colonel Gillenwaters," of Paragraph 3, Count 1, must fall in view of the lack of testimony relating to the mine and Colonel Gillenwaters' testimony as to his management functions.

Subparagraph (a) of Paragraph 3 of Count 1 relates again to the market price and the alleged domination by H. Carroll & Co. The simple fact that shares of Comstock, Ltd. were purchased by H. Carroll & Co. through the facilities of an exchange member certainly does not establish domination. As set forth above, the records presented conclusively show the reverse.

There is no obligation on the part of the company to disclose the source of its stock purchased when selling as principal. This is a fundamental concept in the securities business. The fact that such shares were purchased at a particular low price, with no evidence relating to the time of purchase, would not require a disclosure that such shares had been purchased at any price. No testimony was presented that H. Carroll & Co. had

a right to purchase shares in addition to the shares which it did in fact purchase from the deposit account. The only evidence available is that H. Carroll & Co. did in fact purchase some shares from this account and that these shares were held and thereafter sold as principal to customers at a price substantially equivalent to the price at which the shares were purchased by others, as well as H. Carroll & Co., on the Exchange.

To consider the further alleged omissions set forth in subparagraphs (c) and (f) of Paragraph 3 of Count 1, reference must again be made to the charcoal brochure, Exhibits 57 and 85. It is true, as established by the evidence, that the Country Club Charcoal Corporation had not made a net profit from its operation prior to its "merger" with Comstock, Ltd. Testimony did establish that Country Club had income from operations. The brochure also clearly shows that the Country Club operation was not profitable, for if it had been profitable, there would have been no need for "more money than Alison had to enter the charmed circle." The brochure does not, even by reference or implication, attempt to convince the reader thereof that Country Club had operated in the past at a profit.

As far as projections are concerned, projections of future happenings are not in themselves crimes when clearly labeled as such. The brochure clearly sets forth that "the principals of

Comstock, Ltd. are frank in their inability to estimate the profits." Also, "the foregoing figures are estimates from best information available, but must be understood as projection of estimates." The caption itself to the tabulation is labeled "Projected Production for 1957-58." As far as substantial basis in fact for such projections, the only evidence available on this matter is the statement by Alison that he, the expert in the charcoal field, which was undisputed, felt and still feels that such projections were realistic from the operation of the indicated kilns.

As a matter of law, the tie-in of the preparation of the brown brochure is such that it cannot be attributed to either of the defendants in this case. The brochure was prepared by Raetz under the supervision and control of expert Gillenwaters, with additional information being furnished by charcoal expert Alison. Prior to printing, the brochure was also reviewed by attorney Frank, who was representing Comstock, Ltd., as well as H. Carroll & Co. The good faith in the preparation of this document by such experts is apparent. This is apparent even if there was sufficient evidence to establish that H. Carroll & Co. was responsible for the document's preparation. The Court will certainly take judicial notice that stockholders' reports of every sort and nature are delivered to and in possession of

brokers and dealers in securities throughout the country. Every broker or dealer who has such report in its files or available for examination by prospective stock purchasers, certainly cannot be held criminally responsible in the event any such document contains false statements, for to do so would eliminate all brokers and dealers from the business.

Thus, from an analysis of the record it becomes clear that an acquittal should follow as a matter of law. From a review of the record it becomes apparent that there were many circumstances and facts which were as consistent with innocence as they were with guilt. If a single fact gives rise to such conflicting inferences, this Court has ample authority for setting aside the judgment of conviction. Karn v. United States, 158 F.2d 568, 570 (9th Cir. 1946); Kassin v. United States, 87 F.2d 183, 184 (5th Cir. 1936); Union Pacific Coal Co. v. United States, 173 Fed. 737, 740 (8th Cir. 1909); Nosowitz v. United States, 282 Fed. 575 (2nd Cir. 1922); Gracette v. United States, 46 F.2d 852, 853 (3rd Cir. 1931); Leslie v. United States, 43 F.2d 288 (10th Cir. 1930).

POINT THIRTEEN

THE CUMULATIVE EFFECT OF EACH AND ALL OF THE ERRORS COMPLAINED OF WAS TO DENY THE DEFENDANTS A FAIR AND IMPARTIAL TRIAL.

The case before the court and the jury was, at best, a close case. Under such circumstances, and as a result of the continued and repeated questioning of the prosecution's witnesses by the court, as well as the comments of the court, the majority of which were in the presence of the jury, causes the fairness and the general demeanor of the trial to be questioned. The court, in United States v. Carmel, 267 F.2d 345 (7th Cir. 1959), considered a similar problem and the relationship of the cumulative effect of the actions of the court on the fairness of the trial, and said:

> ". . . We are convinced that all of the evidence in the record presented a close case to the jury for decision. Therefore Carmel's contention that prejudicial error in the course of the trial substantially affected the fairness thereof requires our consideration. Our attention is called to repeated questioning of witnesses and comments by the court, some of which we now cite. . . .
>
> "We recently said, in United States v. Scott, 7 Cir., 257 F.2d 374, 377:
>
> "'The influence of the trial judge on the jury is necessarily and properly of great weight, Starr v. United States, 1894, 153 U. S. 614, 626, 14 S. Ct. 919, 38 L.Ed. 841, and he should not say anything which might have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts. United States v. Levi, 7 Cir., 1949, 177 F.2d 833. It is the

duty of the trial judge to endeavor to maintain throughout the trial an atmosphere of impartiality. United States v. Wheeler, 7 Cir., 1955, 219 F.2d 773. . . .'

". . . We realize that an alert and capable judge at times feels that he can assist in developing the evidence by participating in the interrogation of witnesses. However, he would ordinarily do well to forego such intrusion upon the functions of counsel, thus maintaining the court's position of impartiality, in the eyes of the ever-observant jurors. The record in this case reveals no justification for the extensive intervention of the able trial judge."

Chief Judge Duffy (concurring):

"Judge Schnackenberg has quoted extensively from the examination of witnesses which was conducted by the trial court. Separately considered, many of such quotations would not, in my mind, be a basis for a holding of prejudicial error. However, taken all together, I have been forced to the conclusion that in this close case the attitude of the learned trial judge must have had great influence with the jury, and the 'atmosphere of impartiality' was thus destroyed." United States v. Carmel, 267 F.2d 345, 347 (7th Cir. 1959).

The Statement of Points reflects what counsel for the defense believe to be points of error. Each of the errors complained of could not be argued because of space limitations, and only the 13 most important points have been considered. However, the 78 points urged reflect the atmosphere and basis upon which the defendants suffered what we believe to be an erroneous conviction. A thousand immaterial and irrelevant pieces of evidence appeared in the record for the purpose of creating inference based upon inference and suspicion upon suspicion, if not for the purpose of confusing the jury, so that sympathy for the investor witnesses would bring about a conviction. In Oaks v.

People, 371 P.2d 443 (Colo. 1962), the court said:

> ". . . [N]umerous formal irregularities, each of which in itself might be deemed harmless, may in the aggregate show the absence of a fair trial, in which event a reversal would be required. Penney v. People, 146 Colo. 95, 360 P.(2d) 671. Moreover, technical errors may have a significance requiring a reversal in a close case. People v. Van Cleave, 208 Cal. 295, 280 Pac. 983." Oaks v. People, 371 P.2d 443 (Colo. 1962).

Thus, it is apparent that the defendants were prejudiced by the numerous errors complained of in this brief, and a reversal should follow to the end that a fair trial can be held if this Court does not direct that a judgment of acquittal should enter after reviewing the record.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed and remanded with directions for the trial court to grant the motion for a judgment of acquittal as to both Howard P. Carroll and H. Carroll & Co. or, in the alternative, that the case should be remanded with directions for a new trial before a different judge.

Respectfully submitted,

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APPENDIX

PROSECUTION'S EXHIBITS	IDENTIFIED	OFFERED AND RECEIVED
1		391
2		113 - 135
4		524
6		525
7		528
8		782
15		373 - 782
16		521
18		711
22		465
27	377	382
28		658
29		658
30		658
31		658
32		647 - 658
33		647 - 658
34		647 - 658
36		457
37		457
38		457
39		457
40		457
41		457
43		458
44		277
45		458
46		458
47		280
48		280
52		433
53		434
54		583
55		589
56		589
57		593
58		595
59		593
60		594
61		595
62		596
63		596
64		597

PROSECUTION'S EXHIBITS	IDENTIFIED	OFFERED AND RECEIVED
66		602
67		602
68		420
69		420
70		660
71		660
72		661
73		661
74		662
75		663
76		616
77		616
78		398
		(Withdrawn on page 400)
79		647
81		667
84		458
85	439	441
86	453	457
87	453	457
93	557	784
94	584	585
95	601	602
96	601	602
97		647
103	718	718
104	718	729
105	740	768
106	754	768

DEFENDANTS' EXHIBITS	IDENTIFIED	OFFERED AND RECEIVED
A	139	141
B	139	141
C	144	163
D	282	285
E	282	285
F	282	295
G	282	295
H	506	517
I	506	517
J	700	
K	719	725
L through T	850	